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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE GOMEZ BANDA,

Defendant and Appellant.

F066389

(Super. Ct. No. VCF195745)

**OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Darryl B. Ferguson, Judge.

Rebecca P. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Sally Espinoza, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found Jorge Gomez Banda guilty of first degree murder (Pen. Code,<sup>1</sup> §§ 187, subd. (a), 189) and possession of a firearm by a felon (§ 12021, subd. (a)(1)) and found true the special circumstances that the murder was committed (1) while the victim was engaged in his duties as a peace officer (§ 190.2, subd. (a)(7)) and (2) to further the activities of a criminal street gang (§ 190.2, subd. (a)(22)). The jury also found true allegations supporting a firearm enhancement (§ 12022.53, subd. (d)) and a gang enhancement (§ 186.22, subd. (b)(1)). Banda was sentenced to life in prison without the possibility of parole and a consecutive term of 25 years to life.

Before the trial on guilt, Banda's attorney raised the issue of his client's competence. A competency trial was held, and a jury found Banda competent to stand trial. Banda raises many claims of error related to the competency trial, and he argues the trial court erred by refusing to hold a second competency trial.

After the competency trial, the trial court determined Banda was a person with an intellectual disability and barred the prosecution from seeking the death penalty pursuant to section 1376. Banda contends the court subsequently erred during the trial on guilt by allowing the prosecutor to cross-examine a defense expert with questions that suggested Banda was faking mental retardation despite the court's earlier determination, and, in a similar vein, accuses the prosecutor of various instances of misconduct. Banda also challenges the gang findings, asserting there was insufficient evidence to support either the gang special circumstance or the gang enhancement. Finally, he claims the trial court erred by dismissing a juror during the guilt trial.

We reverse the true findings on the gang special circumstance and the gang enhancement because these findings were not supported by substantial evidence. In all other respects, we affirm the judgment.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise noted.

### **FACTS AND PROCEDURAL HISTORY**

Banda does not dispute that he shot and killed Haws. In the early afternoon of December 17, 2007, Banda was seen walking north at the side of Road 156 near Ivanhoe. As Tulare County Sheriff's Detective Kent Haws drove southbound on Road 156 in his patrol car, Banda turned off the road and walked into an orange grove. Haws made a U-turn. Banda reappeared walking near the road, and Haws pulled over to speak to him. Witnesses reporting seeing Haws with Banda and then hearing gunshots. Haws fell to the ground, and Banda was observed standing over him and pointing a gun at him. Banda then continued walking north along the side of the road.

Sergeant John Brown responded to the scene on a report of an officer down. He spotted Banda walking out of an orange grove. As Brown approached, Banda put his hands up and said, "I have a gun." Banda was placed under arrest, and a small silver firearm was retrieved from his pocket.

The same day, Banda was interrogated about the shooting by Detective Lupe Shade and two other detectives.<sup>2</sup> Banda was 20 years old at the time. He told Shade he had used drugs since he was 15 years old, and his preferred drug was "crystal," that is, methamphetamine. He reported he last used drugs about five days before the interview. Shade did not notice any indication that Banda had recently used methamphetamine.

Banda admitted that he shot Haws. He said he got a gun and started walking to Cutler. He said he bought the gun for about \$100.<sup>3</sup> He saw the police coming, and he

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<sup>2</sup> A videorecording of the interview was made and played for the jury in the trial on guilt. The interview was also admitted in the trial on competence. At different times, Detective Camacho and Detective Steve Sanchez were also present at the interview, but Shade was the primary interrogator. Shade is fluent in Spanish and began the interview speaking to Banda in Spanish. Banda told Shade Spanish was better, but at times during the interview, Banda and Shade switched to English. In the competency and guilt trials, the juries were provided a translated transcript of the interview.

<sup>3</sup> Later in the interview, Banda said he bought the gun from a "homie" at a party for \$130. Asked who he bought the gun from, Banda responded that he did not know, he did not

went into a field. He had a pipe<sup>4</sup> and a gun and thought “maybe he won’t stop, ... he’ll just pass by.” But Haws did stop. He asked Banda why he had gone into the field. Banda explained to Shade: “And, well, I told him to put me in the car, you know, and well, I had everything and well, I said, aah, they’re gonna take me only for a couple months and everything, and I said, nah. Well, I was bored ay. I wasn’t, how do you say it, I was bored and well, I just got the gun and....” Banda said he thought Haws had his hand on his gun and, “I just put ... my hand in the pocket ... and I turned around and I shot him.” Banda shot Haws in the chest and in the head.

Shade asked if he had any problems, and Banda responded that he heard voices of people he knew and it stressed him and made him mad, although he did not understand the things he heard. He said the voices “made [him] do things.” Banda told Shade he had intended to kill himself by shooting himself in the head out in a field. Shade asked if he shot the detective because he was nervous thinking he was going to go to jail. He responded: “Not nervous, but. I thought I was going to go to jail; right? That’s when I said to myself I’m going to go ahead and shoot him right then.”

Later in the interview, Banda said he shot the officer because he was bored. He said, in English, “The thing is I got bored; you know? And I got fed up with it.” Shade asked Banda about gangs, and he reported that he used to hang out with Southern gang members but he was not “jumped into” any gang clique.

Shade asked Banda to demonstrate or reenact the shooting after the interview, and he agreed to do so. (The reenactment was recorded and shown to the guilt-phase jury.)

Two days later, the Tulare County District Attorney filed a complaint against Banda, alleging, in count 1, murder with special circumstances (§ 187, subd. (a)) and, in count 2, possession of a firearm by a felon (§ 12021, subd. (a)(1)). The special

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remember, and he did not want to say the name. Then he said he bought the gun from “like a [p]aisa.”

<sup>4</sup> A glass pipe typically used for smoking methamphetamine was found at the crime scene.

circumstances alleged were that the victim was a peace officer engaged in the performance of his duties (§ 190.2, subd. (a)(7)) and that Banda committed the murder while he was an active participant in a criminal street gang and the murder was carried out to further the activities of the gang (§ 190.2, subd. (a)(22)). With respect to count 1, it was alleged Banda personally and intentionally discharged a firearm, which proximately caused great bodily injury and death (§ 12022.53, subd. (d)). With respect to both counts, it was further alleged the offense was committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(A) & (C)).

In January 2008, Banda's attorney raised the issue of his client's competence and requested the court appoint the director of the regional center for the developmentally disabled to evaluate him. The court suspended the criminal proceedings and eventually appointed two psychologists to evaluate Banda, but did not appoint the director of the regional center for the developmentally disabled. In August 2008, a trial on competence was held, and a jury found Banda competent to stand trial.

The next month, Banda entered pleas of not guilty and not guilty by reason of insanity.

In May 2009, Banda's attorney filed a motion requesting another competence determination. The prosecutor opposed the motion, and in October 2009, the trial court denied the motion for a second competency trial.

In February 2010, the court began a hearing pursuant to section 1376 (also referred to by the parties and the court as an *Atkins* hearing<sup>5</sup>) to determine intellectual disability.

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<sup>5</sup> In *Atkins v. Virginia* (2002) 536 U.S. 304, 321 (*Atkins*), the United States Supreme Court held the Eighth Amendment prohibits the execution of defendants with intellectual disabilities. In California, in cases in which the prosecution seeks the death penalty, section 1376 provides a pretrial hearing procedure for determining whether the defendant is a person with an intellectual disability and is therefore not subject to the death penalty.

In June 2010, the court found that Banda was intellectually disabled and barred the prosecution from seeking the death penalty.

In August 2012, a jury trial on guilt began. On August 28, 2012, the jury began deliberations and reached a verdict. It found Banda guilty of both counts and found true all special circumstances and special allegations.

On September 4, 2012, the sanity phase of trial began. Two days later, the jury found Banda legally sane at the time he committed the offenses.

The trial court sentenced Banda to (1) life without the possibility of parole, plus a consecutive term of 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)), for count 1 and (2) the upper term of three years, plus a consecutive term of four years for the gang enhancement (§ 186.22, subd. (b)(1)(A)), for count 2. The term for count 2 was to run concurrently with the term for count 1.

## **DISCUSSION**

### ***I. Competence to stand trial***

Banda raises seven claims related to the competence determination in this case. We begin with a brief discussion of the law and a summary of the competency trial before addressing each claim.

#### ***A. Standard and procedures for determining competence***

It is well established that the criminal trial of an incompetent defendant violates the due process clause of the state and federal Constitutions. (*Drope v. Missouri* (1975) 420 U.S. 162, 171–172; *Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 857.) In *Dusky v. United States* (1960) 362 U.S. 402 (*Dusky*), the United States Supreme Court set forth the test for determining competence to stand trial as whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational

understanding—and whether he has a rational as well as factual understanding of the proceedings against him.” (Ibid.)<sup>6</sup>

“Due process principles further require trial courts to employ procedures to guard against the trial of an incompetent defendant.” (*In re R.V.* (2015) 61 Cal.4th 181, 188.)

If the court determines a trial on competence is necessary, it must suspend the criminal proceedings (§ 1368, subd. (c)) and “appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant” (§ 1369, subd. (a)).

Section 1369, which sets forth the procedures for a trial on competence, provides in pertinent part, “If it is *suspected* the defendant is developmentally disabled, the court *shall* appoint the director of the regional center for the developmentally disabled ... to examine the defendant.” (§ 1369, subd. (a), italics added.)

During the relevant time period, “developmental disability” was defined as “a disability that originates before an individual attains age 18, continues, or can be expected to continue, indefinitely and constitutes a substantial handicap for the individual,” but did not include “handicapping conditions that are solely physical in nature.” The term included “mental retardation, cerebral palsy, epilepsy, and autism” and “handicapping conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals ....” (Former § 1370.1, subd. (a)(1)(H), as amended by Stats. 1996, ch. 1076, § 2.5.)<sup>7</sup>

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<sup>6</sup> Following the constitutional standard, section 1367 provides the following definition of incompetence:

“A defendant is mentally incompetent ... if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.” (§ 1367, subd. (a).)

<sup>7</sup> At this point, we note that *Atkins* and former section 1376 also used the term “mentally retarded.” (*Atkins, supra*, 536 U.S. at pp. 306–307; former § 1376, added by Stats. 2003, ch. 700, § 1 (former § 1376).) “More recently, however, the high court used the term

### ***B. Competency trial***

In January 2008, Banda's attorney at the time requested the proceedings be stayed pursuant to sections 1368 and 1369. He told the court he suspected Banda was incompetent, mentally ill, and developmentally disabled and requested the court appoint the director of the regional center for the developmentally disabled to evaluate him. The court suspended the criminal proceedings and appointed a doctor to evaluate Banda, but did not appoint the director of the regional center.

Three days later, Banda's attorney filed a motion for reconsideration of the court's appointment order, again requesting appointment of the director of the regional center to examine Banda. In support of the motion, his attorney cited his "own observations and concerns" and noted that the Juvenile Division of the Superior Court of Tulare County had ordered Banda to be evaluated by the Central Valley Regional Center (CVRC) in 2005, although the evaluation did not occur.

At the hearing on the motion for reconsideration, Banda's attorney informed the court that defense expert Dr. Ricardo Weinstein, a licensed psychologist, had tested Banda "and none of the numbers exceeded 68," apparently referring to IQ scores. He explained that Weinstein's testing showed Banda was intellectually disabled "within the context of *Atkins*," which was another reason he "specifically request[ed] that a psychologist or psychiatrist who knows how to examine developmentally disabled people perform this examination." (*Italics added.*) The trial court recognized that the issue of

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'intellectual disability' to describe the identical phenomenon, consistent with the Diagnostic and Statistical Manual of Mental Disorders [DSM] (5th ed. 2013)," and the California Supreme Court has followed suit. (*People v. Boyce* (2014) 59 Cal.4th 672, 718, fn. 24.) Similarly, in 2012, the Legislature amended section 1376, replacing "mental retardation" and "mentally retarded" with "intellectual disability" and "a person with an intellectual disability" without substantive change to the statute. (Stats. 2012, ch. 448, § 42.) While we generally try to use the current terms, the parties in the case who litigated the issue of competency before the change in statutory terminology use the older terms "mentally retarded" and "mental retardation," and we sometimes employ those terms in our discussion for consistency and clarity.

intellectual disability was relevant to determining, first, whether Banda was competent to stand trial and, second, if he were determined to be competent, whether he could be subject to the death penalty under *Atkins, supra*, 536 U.S. at page 321.

The previously appointed doctor had recused himself, and the trial court appointed two licensed psychologists to evaluate Banda. Banda's attorney observed that one of the newly appointed examiners, Dr. Thomas Middleton, was on the CVRC list. The court stated, "[T]he minute order should reflect that I am also requesting that both doctors do an evaluation pursuant to [section] 1369 regarding developmental disability." The court requested that Banda's attorney provide Weinstein's written report of his evaluation to the prosecutor.

One of the appointed examiners subsequently recused himself, and the court appointed Kathe Lundgren, a clinical psychologist, to examine Banda. At that time, the court requested "evaluation for developmental disability in addition to the competency."

At the trial on competence, Banda presented as witnesses his brother and sister, a criminal defense attorney, the two court-appointed psychologists who examined Banda, his own expert in psychology (Weinstein), two mental health services providers who worked at the Tulare County Jail, and a probation officer. The prosecution called Detective Shade, who had interrogated Banda the day he shot Haws. The two court-appointed psychologists testified that Banda was competent to stand trial and was not mentally retarded. Weinstein testified that Banda was not competent to stand trial and was mentally retarded.

### ***1. Expert testimony***

Middleton is a psychologist specializing in court-related work, and he works for the CVRC. He explained California has a system of regional centers (including the CVRC), which provides services for individuals with developmental disabilities including mental retardation. (See Welf. & Inst. Code, § 4500 et seq.)

Middleton saw Banda once, on March 6, 2008, in the interview room of the jail. They spoke in English although a Spanish-language interpreter was present. Banda appeared to prefer English to Spanish, but he periodically checked with the interpreter. The evaluation took about 60 to 90 minutes. Middleton administered a brief test of intellectual functioning called the Kaufman Brief Intelligence Test, second edition (KBIT-2). He assessed Banda to be of low-average or borderline intellectual functioning. Middleton testified that borderline intellectual functioning covers a range of IQ scores from approximately 70 up to the low 80's, and it is different from mild mental retardation, which typically ranges from an IQ of 50 or 55 up to 69. He opined that Banda's reading ability was in the second to sixth grade range and that he had some learning disabilities.

Banda complained that he had been hearing voices for years. He told Middleton he wanted to kill himself and he wanted to kill himself before he shot Haws. Banda said he was experiencing depression, hallucinations, and delusions and he was feeling stressed and overwhelmed. Middleton did not think Banda was lying or trying to exaggerate his symptoms. Middleton diagnosed him with a psychotic disorder not otherwise specified (NOS) and amphetamine dependence (Axis I). Middleton also diagnosed antisocial personality disorder and borderline intellectual functioning (Axis II). In his opinion, Banda's psychotic symptoms were not so severe that they would interfere with his participation in the criminal proceedings.

Middleton gave Banda a subtest of the Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR). Middleton used the CAST-MR because it is "able to cover a wide variety of levels of intellectual functioning," including individuals with mental retardation and those with average IQ scores.<sup>8</sup> Middleton asked

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<sup>8</sup> He further testified the CAST-MR is "specifically designed to identify individuals with mental retardation who are not competent and those that are competent."

Banda how he would respond if he were to testify and, during the prosecutor's questioning, his attorney objected to a question. Banda was given possible answers, and he chose the correct one, "[w]ait for the judge to tell you what to do." He seemed to Middleton to understand the questions, and "he was answering correctly consistently." Banda said the district attorney's job was to be against him and find him guilty and his defense attorney's job was to defend him, take his side, and keep him out of jail. Banda's overall score was 89 percent, and typically any score above 70 percent is reflective of an individual who is competent.

Middleton concluded Banda was competent to stand trial despite his psychotic symptoms. Middleton agreed that "mental retardation might be a component of competence." Banda's attorney asked, "[W]hether or not [a defendant has] the intellect to understand what's going on is in fact a component of competence, correct?" Middleton answered, "In a general sense, yes."

Banda's attorney asked whether he could have a "meaningful conversation" with him about concepts such as "mitigation," "aggravation," "guilt phase trial," and "penalty phase trial." Middleton responded:

"I don't need to know whether he can discuss these matters with you. And about any of them, yes, he can discuss some of them, but the *Dusky* criteria is very simple and very specific. All he needs to know are the charges, have a willingness to work with his attorney, and understand the nature and purpose of a courtroom. I don't have to go into such detail." (Italics added.)

Middleton opined that Banda had the ability to assist his attorney in his own defense.

Lundgren is a clinical psychologist and family nurse practitioner. She consults with a home for the mentally retarded and has worked with individuals with intellectual disabilities regularly. She and an interpreter met with Banda on March 26, 2008.

Lundgren administered the KBIT (first edition).<sup>9</sup> Banda scored in the 13th percentile, which is below average but is not in the range of mild mental retardation. She considered him to be of borderline intellect. Banda used simple words, and Lundgren found his “ability to abstract is extremely limited.” She believed he would profit from testing for attention deficit disorder. Lundgren reviewed Banda’s school records. He was held back in the first grade twice, and around sixth or seventh grade, a teacher promoted him only because of his age. Lundgren did not think Banda lacked the intellectual capacity to pass a written driving test and suggested that, if he had failed the written test multiple times, it may be because he did not make the effort to study.

Banda reported that he heard voices of people he knows. He said methamphetamine did not make the voices better or worse. Banda told Lundgren that prior to his arrest, he was depressed and he obtained a gun and planned to kill himself. He figured the gun would not kill him because he was so large and the gun was so small. He planned to go way out into a field and shoot himself. He thought no one would find him for a long time and he would bleed to death.

Lundgren gave Banda three tests designed to detect malingering and his scores indicated he was malingering. Lundgren concluded he had a methamphetamine-induced mood disorder.

To assess competence, Lundgren used the Georgia Court Competency Test (Georgia test) and the MSH Competency Assessment Instrument. Asked what the role of the judge was, Banda responded, to sentence him and, “[h]e’s the boss man.” He said the district attorney’s role was “[t]o figure things out about me,” his defense attorney’s role was “[t]o help me,” and the jury’s role was “[t]o judge me.” Lundgren asked

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<sup>9</sup> She initially intended to give Banda the Wechsler Adult Intelligence Scale, third edition (WAIS-III), but he recognized some of the props used in the test. Lundgren assumed he had taken the WAIS-III before and decided to give a different intelligence test. She figured if anyone had given Banda the KBIT, it would have been the new version, so she used the “old KBIT,” which is different from the KBIT-2.

Banda to expand on the jury's function, and he kept repeating himself—“‘[Y]ou know, you know.... [T]o judge me.’” Banda said he had been to court but not to a trial. Asked what it means to enter a plea of not guilty by reason of insanity, Banda was not sure and said, “‘Kind of dumb.’” Asked what the possible sentences were if he were found guilty, he responded death penalty, life in prison, and mental hospital. A score of 70 is passing on the Georgia test, and Banda scored 88. Lundgren opined that Banda was competent to stand trial.

Lundgren agreed that whether “Banda is retarded is a component that a psychologist ... would explore in determining competency.” Banda's attorney asked whether Banda had the intellect to weigh considerations to decide whether to testify at trial, and Lundgren responded, “Well, it's my understanding that it's your job to explain that to him.” She believed it was the attorney's job to explain issues to Banda so he would understand and he was capable of understanding. She indicated that Banda might need a Spanish-language interpreter.

Weinstein specializes in forensic neuropsychology and has testified as an expert in California courts more than 100 times. Weinstein is bilingual, and he interviewed Banda three times in 2008 and estimated he spent seven hours with him. Weinstein also interviewed Banda's family for an assessment of his adaptive behaviors.

Weinstein administered three IQ tests. Banda scored 66 on the WAIS-III and 43 on an intelligence test for Spanish speakers. Weinstein thought Banda did not have a dominant language and was not fluent in either Spanish or English. He also conducted an assessment of adaptive behaviors. He concluded Banda was mentally retarded.

Weinstein testified that an IQ score is not a single number but an estimate or range, and the IQ scores Middleton and Lundgren obtained for Banda, when adjusted for the age of the tests, were within the range of mental retardation.

Weinstein administered tests for malingering and determined that Banda was not malingering or faking his psychotic symptoms. He reviewed Banda's medical records

and noted that Banda bangs his head whether he is being watched or not and that nobody ever suggested he did not hear voices. Further, his family reported Banda had experienced auditory hallucinations since he was 15 years old. Weinstein observed Banda several times stop what he was doing and appear to be listening to voices. Weinstein testified that “the voices are very disruptive and he cannot control them,” and he believed Banda suffered from a mental disorder in the form of some kind of psychotic disorder, very likely schizophrenia.

Weinstein testified that the combination of psychosis and mental retardation prevented Banda from being able to assist his attorney in making decisions about his case and participate in the proceedings. He disagreed with Lundgren’s opinion that Banda could understand legal concepts if he just worked harder. Instead, it was clear to Weinstein that Banda was making a good effort during the examination, but he did not understand concepts such as “not guilty by reason of insanity.”

Weinstein criticized Middleton as having stated an improper definition of competence during his testimony. Weinstein testified the correct test for competence is whether the defendant is capable of assisting his attorney in a rational way and Banda was not able to do so.

Weinstein did not give Banda a competency exam, although he recognized the CAST-MR and the Georgia test are competency tests used in his profession. In cross-examination, he agreed that Banda understood he was being prosecuted for the murder of Haws and the potential punishments were life in prison or the death penalty.

Phillip Cherney is a private attorney. He practices capital defense litigation and has testified as an expert in federal court on the standards for defense counsel. He described a criminal defense attorney’s responsibilities in representing a defendant in a potential death penalty case. For example, Banda’s attorney had to make sure Banda understood the concept of life in prison with the possibility of parole. Cherney explained that a criminal defendant should be able to discuss the facts of the case with his attorney

and should be able to talk about his own life history. Cherney met with Banda at the jail in August 2008. He asked Banda if he had heard of due process and Banda responded in the negative. Asked what it meant to have a fair trial, Banda shrugged his shoulders. Cherney asked what a juror is and what a prosecutor does, and Banda said he did not know.

## **2. *Other testimony and evidence***

Maricella Banda is Banda's younger sister. She testified that Banda dropped out of school in 11th grade. Since then, he sometimes had a job, and the longest he ever held a job was two months. Banda is not smart; he failed the written test for a driver's license four times and still does not have a license. He had been hearing voices since he was 15 years old. Banda heard voices when he used methamphetamine, but the voices continued after he stopped.

Fernando Banda is Banda's older brother. Before he was arrested, Banda was living with Fernando and Fernando's wife. Fernando would get Banda jobs, but he never stayed at the jobs. Banda once broke the windows of their father's car and also stole their father's car. On one occasion, there was a confrontation between Fernando and Banda at their parents' house. Banda did something to upset his sister (not Maricella), and Fernando interceded and asked Banda if he were dumb or crazy. Banda responded, "Do you want to see who is dumb? Do you want to see [who is] crazy?" and pulled out a knife.

Fernando testified about a recorded telephone conversation he had with Banda after Banda was arrested. Banda told him, "I fucking hear this fucking retard in my head all fucking day," and, "I can't fucking take it." He said, "I hear this guy that fucking talks shit all day." Banda had a reputation within the family for hearing voices. The family talked about it, but they could not take him for mental health services because "[h]e would get offended."

Dr. Marina Vea is a psychiatrist. She worked for the Tulare County Department of Mental Health Services, which provides services in the county jail. She saw Banda four times in jail. He was cooperative; he complained of hearing voices and seeing things and feeling depressed and anxious. She asked what the voices said. Banda first could not say and then responded that they told him bad things. After their first meeting in March 2008, Vea thought Banda needed medication because of anxiety and depression. She prescribed Seroquel. He told her he felt like hurting himself and he bangs his head on the wall. He also superficially cut his arm. Banda said he had suicidal thoughts but he would not kill himself. Vea did not observe any injuries on his head, and he did not appear to be responding to internal stimuli. She diagnosed Banda with psychotic disorder NOS (Axis I). He appeared to improve over the following months, and he reported he was sleeping better and was less anxious. Vea could not say whether Banda was malingering. She did not know his IQ score, but Banda appeared to be of average intelligence.

Eladio Castro worked for the Department of Mental Health Services as a therapist. Banda was referred to him based on reports Banda was suicidal and he was hitting his head against the wall. The first time Castro saw Banda, he was sleeping underneath his bunk in a cell by himself. Banda was housed in a safety cell a couple times. He told Castro he heard voices that told him to hurt himself. Banda also said he wanted to kill himself a few times. Castro spoke to Banda in English and Spanish and believed Banda was much more comfortable conversing in Spanish. Banda had poor insight and poor judgment and was only able to make limited eye contact. It was Castro's impression in December 2007 that Banda suffered from possible schizo-affective disorder that was a combination of psychosis and a mood disorder. In Castro's experience, people who fake symptoms demand treatment, but Banda did not request mental health services. Banda presented as someone younger than his age, and Castro opined that he had cognitive deficits.

Michael Santos worked as a probation officer in juvenile investigations. He interviewed Banda in 2005 in connection with a charge of being under the influence of a controlled substance. Banda told Santos he heard voices in his head that told him to do bad things. Banda indicated that he got drugs that his friends paid for. He indicated he was affiliated with the Southerners. Santos recommended that Banda be referred to the CVRC for an evaluation because he was hearing voices. The referral was not based on a suspicion that Banda was mentally retarded. Banda struck Santos as “bright” and “insightful.” He was able to hold a normal conversation and answered questions intelligently.

Shade testified about questioning Banda on the day of the shooting. She spoke to him in Spanish and English, and Banda responded appropriately in both languages. He told her he did not have any problems with Haws and he did not hate the police. Asked why he killed Haws, Banda answered he was “stressed” and “bored.” Banda said some people think he is lying when he says he hears voices and some people think he is crazy. Shade noticed that Banda mentioned he heard voices when he spoke in English and appeared to wait for her to write it down, but he did not mention hearing voices when he spoke in Spanish.<sup>10</sup> Shade testified that Banda said he shot Haws because he feared being arrested.

The videorecording of the interview was played for the jury and a transcript with the Spanish portions translated into English was provided.

The jury found Banda competent to stand trial.

### ***C. Analysis***

Banda contends as follows: (1) the trial court acted in excess of jurisdiction by failing to appoint the director of the regional center to assess competence; (2) the trial

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<sup>10</sup> The transcript, however, shows that Banda talked about hearing voices when he answered in Spanish as well as when he spoke in English.

court erred when it failed to instruct the jury that a development disability could render Banda incompetent; (3) the trial court improperly sustained an objection to a defense argument; (4) Cherney should have been allowed to tell the jury he believed Banda was incompetent; (5) the prosecution committed prejudicial misconduct; (6) the evidence was insufficient to prove Banda was competent; and (7) the trial court erred when it refused to reopen competency proceedings after the jury trial on competence. We conclude Banda has failed to establish any reversible error.

***1. Failure to appoint the director of the regional center***

Once a trial court has “before it substantial evidence that raise[s] a suspicion” that a defendant is developmentally disabled, the court is required, under section 1369, subdivision (a), to appoint the director of the regional center for the developmentally disabled to examine the defendant. (*People v. Castro* (2000) 78 Cal.App.4th 1402, 1417–1418, disapproved on another ground in *People v. Leonard* (2007) 40 Cal.4th 1370, 1391, fn. 3 (*Leonard*).)

As a preliminary matter, the Attorney General takes the position the trial court properly declined to appoint the director of the regional center because the record contains no substantial evidence to support a suspicion that Banda was developmentally disabled. We disagree. Banda’s attorney informed the court that his expert psychologist, Weinstein, had tested Banda and the results showed Banda was disabled “within the context of *Atkins*.” Since *Atkins, supra*, 536 U.S. 304, applies to defendants who are intellectually disabled and intellectual disability is a developmental disability (§ 1370.1, subd. (a)(1)(H)), Banda’s attorney clearly conveyed that Weinstein’s testing showed Banda was developmentally disabled. In response, the trial court implicitly found substantial evidence to support a suspicion that Banda was developmentally disabled as it ordered the court-appointed psychologists to “do an evaluation pursuant to [section] 1369 *regarding developmental disability*.” (Italics added.)

While we have not located evidence in the form of a report or declaration from Weinstein supporting the request for the appointment of the director of the regional center for developmental disabilities, it appears the trial court accepted Banda's attorney's representation and did not require the submission of documentary evidence. On this record, we decline to reject Banda's contention on the basis of lack of substantial evidence to support a suspicion that he had a developmental disability.

We do, however, agree with the Attorney General that Banda was not prejudiced by the court's failure to appoint the director of the regional center.

In *Leonard*, our Supreme Court held that when a trial court fails to appoint the director of the regional center to evaluate a criminal defendant with a developmental disability, the defendant's later conviction and sentence "need not be reversed unless the error deprived him of a fair trial to determine his competency." (*Leonard, supra*, 40 Cal.4th at p. 1390.)

The defendant in *Leonard* suffered from epilepsy, a developmental disability, but the trial court did not appoint the director of the regional center to examine him. (*Leonard, supra*, 40 Cal.4th at p. 1388.) The defendant was evaluated by experts who were familiar with his epilepsy and considered it in evaluating whether he was competent. (*Id.* at p. 1390.) The California Supreme Court held there was no prejudice, concluding:

"In summary, appointment of the director of the regional center for the developmentally disabled (§ 1369, subd. (a)) is intended to ensure that a developmentally disabled defendant is evaluated *by experts experienced in the field*, which will enable the trier of fact to make an informed determination of the defendant's competence to stand trial. Here, defendant was evaluated by doctors who possessed these qualifications, and their testimony provided a basis for the trial court's ruling that defendant was competent to stand trial. Thus, the court's failure to appoint the director of the regional center to examine defendant did not prejudice defendant." (*Leonard, supra*, 40 Cal.4th at p. 1391, italics added.)

Here, the two experts appointed by the court to evaluate Banda were experienced in the field of intellectual disabilities. Middleton worked for the CVRC and conducted evaluations to determine eligibility for services from the regional center for the developmentally disabled. He testified that most of the individuals he found to be qualified for services “fell in the range of mild retardation.” Lundgren testified that she worked with individuals with intellectual disabilities regularly. Middleton and Lundgren both testified that whether a defendant has an intellectual disability is relevant to assessing competence to stand trial. Middleton and Lundgren each gave Banda an intelligence test, and each concluded that Banda was not intellectually disabled. Thus, Banda was evaluated by psychologists experienced in the field, and their testimony provided a basis for the jury’s determination that Banda was competent to stand trial. Under these circumstances, the trial court’s failure to appoint the director of the regional center to examine Banda did not prejudice him.

We reject Banda’s challenges to the experience of Middleton and Lundgren in the field of intellectual disabilities. He asserts that Middleton “explicitly stated that he believed Mr. Banda’s mental retardation was not relevant to the competency evaluation.” He relies on Middleton’s response during the following questioning by the prosecutor.

“Q. [Regarding individuals referred by the CVRC whom Middleton determined to be mildly mentally retarded and therefore eligible for CVRC services,] [d]oes that mean they’re not competent for purposes of ... trial?

“A. Not necessarily, but I didn’t evaluate them for competency.

“Q. Okay. Because that’s a different issue, I take it?

“A. *The level of intellectual functioning is one referral question and competency in terms of being able to participate with counsel in his defense and understanding courtroom procedures that is a totally different referral question.*” (Italics added.)

Middleton's response does not show that he believed intellectual disability was irrelevant to the competency evaluation. He merely explained that a referral from the CVRC to assess whether a person is developmentally disabled for the purpose of determining eligibility for services is different from a court appointment to examine a criminal defendant for the purpose of determining whether he or she is competent to stand trial.

Banda also cites Middleton's statement, "Let me make it very clear that I was not doing an evaluation for the [CVRC], and I need to make that separate from my appointment from the court in this particular matter because the Court asked me to do an evaluation of Mr. Banda's competency." But, again, Middleton was distinguishing between examinations he conducts for the CVRC to determine whether a person is developmentally disabled and examinations he conducts based on court appointment to determine whether a criminal defendant is competent to stand trial. Banda's attorney asked: "So CVRC asks you to determine whether or not someone is competent to stand criminal trial. And the Court asks you whether or not someone is competent to stand criminal trial. The tests might be different that you use because CVRC is asking you as opposed to the Court?" Middleton's response explained that the question was incorrectly stated, as the CVRC does not ask psychologists to determine competence. He answered, in part: "If an individual is referred *for eligibility evaluation*, then that would include an IQ test, a measure of adaptive functioning, any other appropriate testing. That is completely separate from the issue of competency. So there are tests for intellectual functioning. There are tests for competency. I do not routinely administer an IQ test when I do a competency evaluation." (Italics added.)

Further, although Middleton stated he does not routinely administer IQ tests for competency evaluations, he did give Banda an IQ test, and he gave Banda a competency test "specifically designed" to determine competence for "individuals with mental retardation." He evaluated Banda's intellectual functioning and found him to be of low-

average or borderline intellect, but not mildly mentally retarded. And, as we have already mentioned, Middleton testified that whether a defendant has an intellectual disability *is* relevant to assessing competence to stand trial.

As to Lundgren, Banda argues she did not testify to any expertise or training in assessing mental retardation, she used an inappropriate test to measure his IQ, and she could not define mental retardation for the jury. Lundgren, however, did testify that she consulted with “a home for the mentally retarded and work[ed] with them regularly.” Banda does not elaborate on his assertion that Lundgren used an inappropriate IQ test. We observe that Weinstein stated the KBIT-2 was not “the proper tool” to evaluate Banda. He testified, “[I]t’s a very quick test of intelligence that’s to be used to obtain an estimate of somebody’s intellectual functioning,” but “[i]t’s not to be used, in my opinion, in forensic environments.” Middleton and Lundgren apparently disagreed with Weinstein’s opinion that the KBIT should not be used in forensic environments since they both used a version of the KBIT to assess Banda’s intellectual functioning. The jury was free to accept or reject Weinstein’s opinion on the issue. (See *People v. Baker* (2002) 98 Cal.App.4th 1217, 1226; *Conservatorship of McKeown* (1994) 25 Cal.App.4th 502, 509; § 1127b.)

Finally, we do not believe Lundgren’s testimony on the question of defining mental retardation disqualified her as experienced in the field. Asked the “current definition of mental retardation” in 2008, Lundgren responded: “Well, there are different levels. There is severe, moderate, mild, and then there is borderline intellectual functioning. And the thoughts have changed about the functional capacity of the different levels. Now, only the most severe are considered unable to perform those functions in life. The moderate and mild in mental retardation are considered educable, trainable, able to have jobs, some with more supervision than others, are capable of living independently....” Banda’s attorney then asked, “I asked if you knew the definition of mental retardation in 2008, what the current definition is, if you know.” Lundgren

answered: “Well, *I don’t know*. You asked me about the different levels of IQ, 55 and below and 60 and above. Is that what you’re asking?” (Italics added.) At this point, the trial court interjected, “I think a better question would be, is there one definition for mental retardation?” After Banda’s attorney adopted the court’s rephrasing of the question, Lundgren responded, “Yes. There are differing definitions, but it would be the limited intellectual capacity.” She also agreed that the onset had to be before age 18 and that “the concept of being able to deal with it, ... your level of disability and getting on with life” (i.e., adaptive behavior) is part of the condition. This testimony does not demonstrate that Lundgren was inexperienced with intellectual disabilities or was disqualified from evaluating Banda.

In summary, we conclude the court’s failure to appoint the director of the regional center to examine Banda did not result in prejudice.

## **2. *Jury instruction on competence***

The trial court instructed the jury on competence, in relevant part, as follows: “The law presumes that a defendant is mentally competent. In order to overcome this presumption the defendant must prove that it is more likely than not that the defendant is now mentally incompetent because of a mental disorder.”

Banda claims the instruction given was not complete because it failed to explain that mental incompetence could be the result of mental disorder “or developmental disability.” (§ 1367, subd. (a).) He further argues that the instruction did not allow the jury to consider his intellectual disability as evidence of mental incompetence. We consider Banda’s claim even though he did not object to the jury instruction at trial because he asserts his substantial rights were affected by the alleged error. (See *People v. Taylor* (2010) 48 Cal.4th 574, 630, fn. 13.)

The Attorney General responds that it is not reasonably likely the jury read the instruction as precluding evidence of mental retardation to support incompetency. (See *People v. Kelly* (1992) 1 Cal.4th 495, 525 (*Kelly*) [“the question is whether there is a

‘reasonable likelihood’ that the jury understood the charge as the defendant asserts”].) Given the evidence presented and the arguments made in this case, we agree.

Every expert psychologist, including Middleton and Lundgren, testified that mental retardation is relevant to determining whether a person is competent to stand trial. Weinstein opined that Banda’s combination of psychosis *and mental retardation* caused him to be incompetent to stand trial. Whether Banda was mentally retarded was addressed by each expert psychologist and was well litigated by the parties. Together with the evidence that Banda heard voices and possibly suffered from psychosis or schizophrenia, the evidence of Banda’s low intellectual functioning was central to the issue of competence.

Banda claims that defense counsel was prevented from arguing mental retardation was a significant reason why he was incompetent to stand trial, but the closing statements by the parties contradict this claim. Banda’s attorney clearly relied on evidence of mental retardation in arguing Banda was incompetent. He emphasized Banda’s intellectual deficits, asserting, “I’m representing a little kid in a man’s body,” and reminding the jury that Banda was held back twice in the first grade. He further argued that Middleton’s IQ testing showed Banda’s verbal score was 68, below the “retardation cutoff score” of 70. In response, the prosecutor stressed the fact that Middleton and Lundgren concluded Banda was *not* mentally retarded, implicitly acknowledging that mental retardation was relevant to the competence determination. In addition, at one point during trial, the trial stated, “[mental] retardation is an element that [the psychologists] consider for competence ....”

In light of the evidence and arguments presented, a reasonable jury would have understood that mental retardation was relevant to the competence determination. Since there is no reasonable likelihood the jury would have thought it was *not* allowed to consider mental retardation as evidence of incompetence, we reject Banda’s claim of instructional error.

**3. Sustained objection to defense argument that mental retardation rendered Banda incompetent**

During his closing statement, Banda's attorney argued: "When Dr. Middleton tells you that my client's verbal IQ score is 68, when Dr. Weinstein tells you that my client's IQ is even less than that, when Dr. Lundgren tells you that the verbal score is higher than that and you're not sure, but it's probably more likely than not that the score is low, lower than 70, I put it to you that that's a preponderance. He is to be found incompetent."

The prosecutor objected, and the court sustained the objection, stating:

"That's not the law, Counsel. The law is incompetence is different than retardation. And when you're talking about those scores, that has to do with retardation, whether or not he's retarded, not whether or not he's competent. Now, competence—retardation is an element that they consider for competence, but that score does not indicate that he is or is not, in fact, competent. What that score indicates is that—well, what the witnesses testified to regarding his retardation or level of retardation."

Banda's attorney did not object to the trial court's statement. Instead, he noted that, while "[p]eople that are retarded can be competent" and "[p]eople that are psychotic can be competent," in this case, Banda's "combination of retardation and psychosis" rendered him incompetent.

Now on appeal, Banda contends the trial court's statement after sustaining the prosecutor's objection was wrong because mental retardation alone can render a defendant incompetent. This contention is without merit because the court did not misstate the law. The trial court did not say that mental retardation alone *cannot* render a defendant incompetent. (Cf. *Kelly, supra*, 1 Cal.4th at p. 540 [no misstatement of law where prosecutor argued mental illness and insanity are "two different things"; prosecutor "never suggested that mental illness *cannot* establish insanity"].) Rather, the court correctly observed that determining whether a person is incompetent is different from determining whether that person is mentally retarded. (See *Atkins, supra*, 536 U.S.

at p. 318 [“Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial.”].) Even Weinstein testified that being mentally retarded does not automatically make someone incompetent. At trial, Banda’s attorney seemingly understood and agreed with the trial court’s point—he continued his closing statement by acknowledging that not all persons who are mentally retarded are incompetent.

We reject Banda’s argument that the trial court’s ruling improperly restricted his attorney’s arguments and misled the jury on the law of competence. The only expert to conclude Banda was incompetent to stand trial, Weinstein, testified that his incompetence was due to a combination of mental retardation and psychosis. Banda’s attorney made that argument in his closing statement. We fail to see how the court’s correct statement that mental retardation and incompetence are different could have improperly restricted Banda’s attorney’s arguments or misled the jury on the standard for competence.

#### **4. *Not allowing Cherney to testify on Banda’s competence***

##### **a. *Background***

Before the trial on competence, Banda’s attorney informed the court that he intended to present Cherney as an expert to testify on whether Banda could assist his attorney in preparing his defense, relying on *United States v. Duhon* (W.D. La. 2000) 104 F.Supp.2d 663, 670 (*Duhon*).<sup>11</sup> He argued, “[T]he jury needs to know what the crux of [the] ‘attorney-client’ communication is.”

A letter written by Cherney was filed with court. Cherney met with Banda for 30 minutes. Cherney wrote that Banda had never heard of the Constitution, the Bill of Rights, or “‘due process,’” and he shrugged his shoulders when asked what it meant to

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<sup>11</sup> In *Duhon*, a federal district court found a defendant incompetent to stand trial due to his mental retardation, and the defendant was hospitalized. (*Duhon, supra*, 104 F.Supp.2d at p. 664.) After the hospital certified the defendant as competent to stand trial, the court appointed a forensic psychologist and a criminal defense attorney to assess the defendant’s competence. (*Id.* at p. 669.)

have a “fair” trial. He did not know what the terms “juror,” “jury,” “waive,” “give up rights,” “right against self-incrimination,” “confront witnesses,” “premeditation,” and “presumption of innocence” meant. He did not know what a “prosecutor” does. Banda said witnesses are “people ‘who see things’” and “the ‘judge’s job is to punish me.’” Banda appeared to be genuinely trying to cooperate, but he “struggled mightily with every subject ... brought up or term ... used” even though Banda’s attorney had attempted repeatedly to explain the same or similar concepts to him. Cherney did not see how Banda could rationally assist in his own defense. He wrote, “[Banda] is one of the most *disabled* individuals I have met, and *the most* disabled of any capitally charged person I have met” in over 31 years’ experience.

The prosecution filed an objection to Cherney’s testimony.

The court ruled Cherney could testify as an expert about what an attorney does, how an attorney prepares a case, the relationship between an attorney and his client, and the importance of a client being able to communicate with his attorney. Cherney also would be permitted to testify “as to his apparent inability to communicate with [Banda].”

The court ruled, however, that Cherney would not be allowed to give his opinion on Banda’s competence and whether he could assist in his defense. The court’s rationale for limiting Cherney’s testimony was that the three psychologists were more appropriate expert witnesses to testify on those issues.

### ***b. Analysis***

Banda argues the trial court erred when it refused to let Cherney offer his opinion on competence. We conclude any error was harmless.

Expert opinion testimony is admissible if it is “[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” (Evid. Code, § 801, subd. (a).) Opinion testimony from a lay witness is limited to an opinion that is “[r]ationally based on the perception of the witness” and “[h]elpful to a clear understanding of [the witness’s] testimony.” (Evid. Code, § 800.)

We review a trial court's ruling on the admissibility of opinion testimony for abuse of discretion. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 128, 131.) ““The trial court's exercise of discretion will not be reversed on appeal except on a showing that that discretion was exercised “““in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.”””” (*People v. Miller* (2014) 231 Cal.App.4th 1301, 1309.)

Banda argues an attorney may give expert opinion testimony regarding a defendant's ability to assist in his own defense and the trial court should not have prevented Cherney from offering his opinion on the ultimate question of Banda's competence. The Attorney General takes the position that an expert witness “must have particular scientific knowledge to render an opinion on a defendant's competency to stand trial.” We need not decide whether Cherney should have been permitted to give his opinion on Banda's competence, however, because we see no prejudice from the court's ruling.

Cherney was allowed to testify as an expert on what a criminal defense attorney does and the importance of communication between the attorney and client. He was also permitted to testify about his own experience in trying to communicate with Banda. Cherney explained how a defense attorney has to explain, and discuss with the client, concepts such as “mitigation,” “aggravation,” and “not guilty by reason of insanity” and rights such as the right to confront witnesses. He testified that he met with Banda the previous week. At that time, Banda said he had never heard of “due process,” the Constitution, or the Bill of Rights, he did not know what it meant to have a fair trial, and he did not know what a juror or prosecutor does. Cherney testified that, aside from the fact that he faced a sentence of either the death penalty or life in prison, Banda “knew nothing else about the proceedings as they may relate to a penalty phase.” Thus, the jury was educated about the importance of communication between a client and his attorney in preparing a defense, and it heard that Banda still was not familiar with basic and

significant concepts related to a criminal trial. In addition, through Weinstein's testimony, the jury heard that Banda was mentally retarded and was not fluent in either English or Spanish. And all the experts agreed Banda had below average intelligence—Middleton found Banda to be of low-average or borderline intellectual functioning, and Lundgren found him to be of borderline intellect with extremely limited ability to abstract.

Viewing the record as a whole, we conclude any error in limiting Cherney's testimony was harmless. In light of the fact the jury heard all the evidence that provided the basis for Cherney's opinion that Banda was not competent, it is not reasonably probable the jury would have reached a more favorable verdict if the trial court had allowed Cherney to offer his opinion on Banda's competence. (See *People v. Dehoyos*, *supra*, 57 Cal.4th at p. 131 [applying *Watson* standard to claim of erroneous limitation on witness testimony]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 663 [same for expert testimony].) Further, given that Banda was able to present as witnesses two experts (one in psychology and one in criminal defense), two of Banda's relatives, two jail employees, and a probation officer to support his claim of incompetence, we reject Banda's contention that the trial court's ruling interfered with his right to present his case. (See *People v. Thornton* (2007) 41 Cal.4th 391, 443 [““As a general matter, the ‘[a]pplication of ordinary rules of evidence ... does not impermissibly infringe on a defendant's right to present a defense.’””]; *People v. Benavides* (2005) 35 Cal.4th 69, 91 [“generally, violations of state evidentiary rules do not rise to the level of federal constitutional error”].)

#### **5. *Alleged prosecutorial misconduct***

Banda next contends the prosecutor committed prejudicial misconduct, first, by introducing evidence regarding the charged offense, Banda's history of violence, and his alleged gang ties and, second, by arguing the killing of Haws was “evil,” questioning the

value of Weinstein's testimony, and reciting a few lines from Shade's interrogation of Banda. We disagree.

***a. Evidence presented***

During cross-examination, the prosecutor elicited testimony from Maricella that Banda told her he shot the officer in the stomach and then in the head. Maricella was also asked about an incident a few years earlier in which Banda said he was going to stab Fernando. Fernando testified about the knife incident as well.

In direct examination, Fernando testified that Banda moved back and forth between Fernando's house and their parents' house because their parents "would have issues with him." Fernando admitted that he himself used to have problems with the law and used to be involved in a gang, but he left the gang about four or five years earlier. He testified that Banda was not involved in gang activities.

In cross-examination, the prosecutor elicited testimony that the "issues" their parents had included Banda hitting their father and stealing their father's car. The prosecutor also followed up on the issue of gang involvement. Fernando testified he was familiar with a gang tattoo some Sureño gang members have of three dots on the hand. He knew that Banda had a tattoo of his name but did not know if Banda had a tattoo of three dots. (In his postshooting interview, Banda showed a tattoo of three dots on his right arm.) When Banda was in jail, Fernando asked him whether he was housed on a floor with Sureños.

As an initial matter, Banda has forfeited most of his claims of prosecutorial misconduct because he failed to object to the prosecutor's questions as irrelevant at trial. (See *People v. Tully* (2012) 54 Cal.4th 952, 1013.) He did object to the prosecutor's questioning of Fernando about his own gang tattoos. In any event, we conclude the questioning did not amount to misconduct.

Banda claims the prosecutor's cross-examination of his siblings was irrelevant and served to "inflame the jury's passions." We disagree. Maricella's testimony that Banda

told her how he shot Haws was relevant to show he understood the facts of his case. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 806 (*Jablonski*) [audiotape by the defendant recounting circumstances of crime was probative of whether he was malingering]; cf. *People v. Samuel* (1981) 29 Cal.3d 489, 504 [confession that was “fairly coherent” and “apparently accurate” would tend to prove the defendant’s competence].)

The evidence of Banda’s prior bad acts—hitting his father, stealing his father’s car, and pulling a knife on his brother—was relevant to bolster Middleton’s determination that Banda had antisocial personality disorder, but was competent to stand trial. The prosecutor further used the diagnosis of antisocial personality disorder to argue that Banda was lying or pretending to be incompetent.<sup>12</sup>

With respect to the gang-related questioning, the prosecutor’s stated purpose was to show Fernando’s bias. In a discussion outside the presence of the jury, the trial court agreed that gang involvement was relevant to Fernando’s credibility. (See *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1168 [gang evidence is relevant to witness’s credibility].) Evidence of the common gang membership of Fernando and Banda would also tend to show bias. (See *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 342.) In addition, Fernando’s testimony that Banda did not have a gang tattoo was contradicted by evidence that he had three dots on his right arm. Thus, the gang-related questions were relevant to Fernando’s credibility.

Banda claims the prosecutor engaged in misconduct by introducing evidence of the postshooting interview and his reenactment of the crime. However, Banda’s ability to

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<sup>12</sup> In his closing statement, the prosecutor described the behaviors associated with antisocial personality disorder, including deceitfulness, and recounted Banda’s prior conduct to show the diagnosis was appropriate. He then argued, “[N]ow he’s trying to work the system everywhere he can get.” Banda’s prior conduct was relevant to support the prosecution’s theory that he was exaggerating or inventing symptoms of psychosis and intellectual disability to avoid trial. (Cf. *People v. Alfaro* (2007) 41 Cal.4th 1277, 1329 [questions about the defendant’s prior misconduct were permissible impeachment of expert’s testimony that the defendant was not malingering and did not suffer from antisocial personality disorder].)

describe the crime was relevant to whether he was competent. (See *Jablonski, supra*, 37 Cal.4th at p. 806; *People v. Samuel, supra*, 29 Cal.3d at p. 504.) More generally, evidence of the crime “served a legitimate purpose in the competency trial: to convey to the jurors the essence of the case against which [the] defendant would have to defend himself, in order that they could assess his understanding of the charges and ability to assist counsel in his defense.” (*People v. Dunkle* (2005) 36 Cal.4th 861, 884, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Finally, we observe that, contrary to Banda’s assertion that there could be no strategic reason for his attorney not to object to admission of evidence of the postshooting interview, portions of the interview supported his claim of incompetence. (Cf. *Kelly, supra*, 1 Cal.4th at p. 521 [noting that defense “counsel had to make a tactical decision whether on balance admission of the confession would help or hurt the defense”].) The prosecutor’s questioning of Fernando implied that Banda’s claim of incompetence was a ploy devised by his family.<sup>13</sup> But the interview showed that immediately after the crime and before he talked to his brother, Banda told Shade that he heard voices and that people said he was crazy. The interview also appeared to confirm the observations made by the experts about Banda’s low intellectual functioning and inability to engage in abstract thinking. Banda’s attorney noted that, before the questioning started, the video showed Banda alone in the interview room for a long period of time; he was handcuffed with his leg shackled to a chair. Banda checked the chain on his leg over and over, “many dozens of times.” His attorney argued this was “a very interesting non-test of intellect” as “Banda want[ed] to check the chain again and again and again,” and “he never learn[ed].” During the interview, Banda used simple words, he repeated himself and seemed unable

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<sup>13</sup> The prosecutor elicited testimony from Fernando that, when Banda was in jail, Fernando told him in a recorded telephone call, “[I]sn’t that right, you’re not right in the head; isn’t that right?” and Banda responded, “I don’t know.” Fernando told Banda not to say what happened: “Who it was, or how it happened. Nothing. You don’t know. You’re crazy, Bro. You don’t know.”

to explain his thinking or motivation with any clarity or insight. Accordingly, it was reasonable for Banda's attorney not to object to admission of the interview both because it was relevant to the issue of competence generally and because it supported his claim of incompetence.

***b. Closing argument***

Banda also challenges the following parts of the prosecutor's closing statement.

The prosecutor argued that Banda's interview statements contradicted his claim that he was incompetent because of intellectual disability and psychosis:

"'I was bored.' [Banda] didn't say, you know what, some voice was telling me to do this. He didn't say that. He didn't communicate in a way to where it was clear he didn't understand what the officer was saying or that he was talking to anybody but the officers when they talked to him. He communicated with them in a very clear and direct manner other than when he didn't want to tell them something.

"He wasn't having problems with voices, neither when he shot the officer or when he talked to the detectives. He was bored is what he said.

"But then it became a little more clear. 'I didn't want to go to jail.' *That is an evil thought of an evil person, a clearly evil thought*, but it is a rational thought. Didn't like jail. Still doesn't like jail." (Italics added.)

The prosecutor pointed out that the two court-appointed psychologists found Banda to be competent and, although Weinstein concluded Banda was not competent, he did not administer a competence test. He told the jury: "[Middleton and Lundgren] found he was competent, and they actually evaluated him for competency. And we're here on the word of Dr. Weinstein *who billed \$15,000 and didn't even bother to do a competency assessment*. A week and a half of your time to determine whether he's competent, and he didn't bother to do an assessment." (Italics added.) Later in his closing statement, the prosecutor said: "Then we got Dr. Weinstein. 'He's not competent' for \$15,000."

The prosecutor also recounted a part of the interview during which Shade asked if Banda thought of “his family.” Banda asked, “Whose family?” and Shade said, “The officer[']s family.” Banda responded: “What can I tell them? Nothing. I’m thinking, you know, well, my family.”

A prosecutor commits misconduct if he or she uses deceptive or reprehensible methods to attempt to persuade the jury. (*People v. Earp* (1999) 20 Cal.4th 826, 858.) “To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.’ [Citations.]” (*Ibid.*)

In this case, any harm could have been cured by admonitions from the court. As a result, Banda forfeited his claim of prosecutorial misconduct by failing to raise timely objections and requests for admonition. Furthermore, we discern no prejudicial misconduct.

“Prosecutors ‘are allowed a wide range of descriptive comment and the use of epithets which are reasonably warranted by the evidence’ [citation], as long as the comments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury [citation].” (*People v. Farnam* (2002) 28 Cal.4th 107, 168 (*Farnam*).) Here, the prosecutor argued Banda’s explanation to Shade of what he did was evidence that he was able to communicate with others and that he was not as disabled as portrayed by Weinstein. In context, the prosecutor’s description of Banda’s thought as “evil” but “rational” was a fair comment on the evidence. We do not find the statement to be either deceptive or reprehensible.

Nor was the prosecutor’s statement about Weinstein’s compensation misconduct. “It is within the bounds of proper argument to attack the credibility of defense expert witnesses, and the weight to be given their testimony, based on the witnesses’ compensation and the fact of their employment.’ [Citation.]” (*Farnam, supra*, 28

Cal.4th at p. 171.) The prosecutor's main point, that Weinstein's testimony should be discounted because he failed to give Banda a competency test, was not improper. (See *People v. Bennett* (2009) 45 Cal.4th 577, 615.)

The prosecutor highlighted Banda's statement that he was thinking of his own family, not the victim's, to demonstrate Banda's behavior was consistent with a diagnosis of antisocial personality disorder. This was a reasonable argument based on the evidence. (See *Farnam, supra*, 28 Cal.4th at p. 169 [prosecutors have wide latitude to draw inferences from the evidence].) Even assuming this was not an appropriate argument, given that Banda's interview was admitted as evidence, we see no risk of prejudice from the prosecutor's brief recitation of one of Banda's responses to a question.

In short, Banda has failed to demonstrate the prosecutor engaged in prejudicial misconduct.

#### **6. *Sufficiency of the evidence***

Banda claims the evidence was insufficient to show he was competent because the two court-appointed psychologists who found him to be competent did not consider his mental retardation in their analysis and "misconstrued the competency test." We are not persuaded.

"A defendant is presumed competent unless the contrary is proven by a preponderance of the evidence. An appellate court reviews the record in the light most favorable to the jury's determination, and determines whether substantial evidence supports the finding. Evidence is substantial if it is reasonable, credible and of solid value." (*People v. Turner* (2004) 34 Cal.4th 406, 425 (*Turner*).)

Here, court-appointed psychologists Middleton and Lundgren evaluated Banda and determined he was competent to stand trial. Banda scored 89 percent on the CAST-MR, well above the 70 percent threshold for competence. His score of 88 on the Georgia test also was above the minimum passing score of 70. Although he did not administer a competency test himself, Weinstein agreed these two tests are used in his profession.

Middleton gave his opinion that Banda had the ability to assist in his own defense. Lundgren testified that Banda was capable of understanding legal concepts. In addition, a psychiatrist who treated Banda in jail testified that he appeared to be of average intelligence, and a probation officer who interviewed Banda in 2005 testified he could hold a normal conversation and answer questions intelligently. This was substantial evidence to support the jury's finding that Banda was competent. (See *Turner, supra*, 34 Cal.4th at p. 426 [sufficient evidence of competence where court-appointed experts testified the defendant "could adequately communicate with his attorneys if they spent enough time with him" and jail employees testified the defendant was cooperative, coherent, and followed directions].)

Banda argues Middleton and Lundgren misconstrued the standard for competency, and they testified regarding whether Banda was *willing* to cooperate with his attorney rather than whether he was *able* to cooperate with his attorney. We disagree with Banda's characterization of the experts' testimony. Middleton opined that Banda had the "*ability* to assist in his own defense," not simply that he was willing to assist in his defense. (Italics added.) Lundgren testified that Banda was "*capable* of understanding" a legal concept if explained to him "in a more conversant way." (Italics added.) Thus, contrary to Banda's argument, both experts assessed Banda's ability to communicate and cooperate with his attorney.

Banda claims the court-appointed experts' opinions must not be considered because they misunderstood the "medico-legal definition of mental retardation" and neither considered Banda's adaptive deficits or understood that an IQ score of 75 could qualify as retarded. This claim is made for the first time in his reply brief. "It is axiomatic that arguments made for the first time in a reply brief will not be entertained because of the unfairness to the other party." (*People v. Tully, supra*, 54 Cal.4th at p. 1075.) Even if we were to consider the argument, we would reject it. Banda's claim that Middleton and Lundgren misunderstood the definition of mental retardation is an

argument for the jury to consider in weighing the various experts' testimony, but it does not defeat the substantial evidence in the record supporting the jury's finding of competence. As we have described, Middleton and Lundgren had experience in the field of intellectual disabilities, and they both determined that Banda was competent and not mentally retarded. Since each of them personally met with Banda, observed him, and administered intelligence tests and competency tests, their opinions were based on sufficient factual foundation. Their testimony provided substantial evidence that Banda was competent.

**7. *Failure to grant request for second competency trial***

Banda's final claim related to the competence determination is that the trial court committed prejudicial error when it refused to reopen the competency proceedings. We conclude the trial court did not err when it determined that a second competency trial was not warranted.

In May 2009, about nine months after the jury found Banda competent to stand trial, his attorney filed a motion requesting a new competency hearing. The motion was based on a written report by Dr. Arturo Silva, M.D.,<sup>14</sup> and an addendum report and "SKIL QEEG Report" prepared by Weinstein.<sup>15</sup> The prosecution opposed the request.

After reviewing the motion and opposition, the trial court was "not sure what to make of the [QEEG] report" and stated, "My feeling is I'd like some input from the doctors on the other side to tell me what their position is, whether this is really a change—a sufficient change of circumstance" to justify a new hearing on competence. The court reappointed Middleton and Lundgren to review Silva's report, Weinstein's

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<sup>14</sup> The defense hired Silva to assess Banda for intellectual disability in preparation for the *Atkins* hearing. After meeting with Banda, Silva gave defense counsel his opinion that Banda was incompetent to stand trial.

<sup>15</sup> "QEEG" stands for quantitative electroencephalogram, which has been described as a test that "detects and 'maps' the brain's electrical activity." (*People v. Clark* (2011) 52 Cal.4th 856, 883.)

addendum report, and the QEEG report “to determine if [their] previous opinion[s] will change as to [Banda’s] competency.”

Middleton and Lundgren filed written responses addressing the new reports, and Banda filed additional evidence in the form of a letter by Dr. Stephen Greenspan, a psychological consultant.

In October 2009, the court denied Banda’s motion for a new competency determination.

*a. New evidence*

Silva met with Banda for almost eight hours over the course of two days in April 2009 and reviewed documents including school records, psychological-legal reports prepared by Weinstein, Middleton, and Lundgren in 2008, and more recent test results by Weinstein. In his report, Silva concluded that Banda suffered from a major psychiatric disorder and was not currently competent to stand trial. He reported that Banda “stated that he was interacting well with his attorney and that he had spoken with him on many occasions.” Banda “stated that he is often able to trust his attorney at the time that his attorney is visiting him.” However, Banda “also stated that often and within the same day after his attorney visits him, [he] develops serious concerns about the trustworthiness of [his attorney].” Banda said that, after his attorney visits, he begins to hear his attorney’s disembodied voice and see unrelated images of his attorney. Banda said this situation made him confused about his attorney’s behavior and trustworthiness.

In his addendum report, Weinstein described additional testing he conducted with Banda in December 2008 and April 2009. He administered the MacArthur Competency Assessment Tool-Criminal Adjudication (MacCAT) and obtained Adaptive Behavior Assessment System-Second Edition (ABAS II) protocols from Banda’s brother and sister-in-law, a teacher, a school principal, and a worker supervisor. Information from the ABAS II protocols indicated “very significant adaptive behavior deficits in all areas measured,” which were present before age 18. The results placed Banda in the range of

mental retardation. Banda's performance on the MacCAT showed clinically significant impairment in "[u]nderstanding" and "[a]ppreciation" and mild impairment in "[r]easoning."

In the QEEG report, Weinstein concluded: "Significant (at 2 or more standard deviations from the mean) brain dysfunction was identified in multiple regions of the brain. Overall it can be stated that Mr. Banda's brain appears to be immature and poorly developed. These conditions can result from genetic and acquired brain insults. [¶] The information obtained through the QEEG is very consistent, although not diagnostic, with the diagnosis of mental retardation and psychosis."

After reviewing the new reports, Middleton remained of the opinion that Banda was competent to stand trial. The QEEG report did not change his opinion because it was "irrelevant to the issue of competency." Middleton found Weinstein's report to be "of questionable appropriateness." He observed that Weinstein did not provide data supporting his conclusions. With respect to Silva's report, Middleton noted that Silva "addressed forensic issues in little detail" and did not address Middleton's prior evaluation of Banda at all. Middleton reiterated that, in his testing of Banda in 2008, Banda had responded appropriately and consistently to the CAST-MR, and he understood his rights, the legal concepts, and how to participate with counsel in his defense. Middleton diagnosed Banda with a psychotic disorder NOS and borderline intellectual functioning, which he recognized were "certainly significant factors" but these "d[id] not substantially interfere with [Banda's] competency to stand trial." Middleton concluded that Banda did not suffer from a developmental disability and did not function in the range of mental retardation.

Similarly, the new reports did not undermine Lundgren's conclusion that Banda was competent. She explained the clinical usefulness of QEEG testing is controversial and QEEG techniques "are very predisposed to false positive errors, erroneously identifying normal or normal variant patterns as abnormalities." She wrote that the test's

ability “to discriminate between various groups of psychiatric patients and normal subjects is not well established” and most experts believe QEEG results should not be used in civil or criminal judicial proceedings. Lundgren noted that Silva’s report of the content and psychotic quality of the auditory and visual hallucinations was much different from what was evident in her evaluation of Banda in March 2008. She wrote that the diverse types of hallucinations reported by Banda was unusual even in schizophrenic cases and this “may be explained by sensory deprivation of being in jail or by *continued malingering* by agreeing to any type of symptom which is asked or suggested.” (Italics added.) As to Weinstein’s addendum report, the scores from Banda’s former teacher and principal were much higher than the scores from Banda’s family, perhaps indicating the family was exaggerating Banda’s intellectual difficulties. Lundgren further implied Banda was malingering, noting that he still reported suffering from bizarre and acute hallucinations even though he had been receiving antipsychotic medication since March 2008, and “it is unusual that he would not have a reduction or an elimination of the acute positive psychotic symptoms” from medication.

Greenspan was hired by the defense to evaluate Banda for mental retardation for a possible *Atkins* hearing. Greenspan reviewed Weinstein’s and Silva’s reports and the written responses of Middleton and Lundgren. He criticized Middleton for not considering the possibility that Banda may have regressed significantly over the 18 months since Middleton evaluated him. He wrote that Middleton “gave no reason why the court should not consider [Weinstein’s MacCAT findings] to be significant and relevant.” Greenspan questioned Middleton’s conclusion that Banda’s KBIT score of 73 showed he was not mentally retarded, noting that a 2002 diagnostic manual provides an IQ ceiling for diagnosing mental retardation of 75. With respect to Lundgren’s response, Greenspan acknowledged that QEEG testing has the potential for producing false results, but it “is commonly used as a diagnostic measure for diagnosing brain abnormalities and brain injury.” He observed that Lundgren did not address the results of Weinstein’s

MacCAT in her response. He *also* criticized both Middleton and Lundgren for using the KBIT because that intelligence test is a screening measure and is inappropriate for diagnosing mental retardation. Greenspan opined that the reports by Silva and Weinstein were sufficient evidence of incompetence to justify another hearing on the matter.

***b. Analysis***

“Once a defendant has been found competent to stand trial, a second competency hearing is required only if the evidence discloses a substantial change of circumstances or new evidence is presented casting serious doubt on the validity of the prior finding of the defendant’s competence.” (*People v. Medina* (1995) 11 Cal.4th 694, 734; see *People v. Huggins* (2006) 38 Cal.4th 175, 220 (*Huggins*).)

“We apply a deferential standard of review to a trial court’s ruling concerning whether another competency hearing must be held.” (*Huggins, supra*, 38 Cal.4th at p. 220.) Our Supreme Court has “review[ed] such a determination for substantial evidence in support of it” (*ibid.*), but also has reviewed such a determination for abuse of discretion (e.g., *People v. Marshall* (1997) 15 Cal.4th 1, 33).

In *Huggins*, the defendant was found competent by a jury while criminal charges were pending. (*Huggins, supra*, 38 Cal.4th at pp. 187–189.) Six years later, at the beginning of a second penalty phase trial, defense counsel requested another competency trial, asserting the defendant’s mental condition might have deteriorated since the issue had been addressed. New evidence consisted of the testimony of a psychiatrist who concluded that the defendant was incompetent to stand trial, although the psychiatrist also conceded that the defendant’s psychotic state had not changed in many years. The trial court denied the motion finding no substantial change in the defendant’s mental condition. (*Id.* at pp. 219–220.) Our high court sustained the trial court’s ruling. The court explained:

“Although the fact of the prior competency determination did not by itself establish [the] defendant’s competency before the second penalty

phase [citation], a second competency hearing was required only on a showing of a substantial change of circumstances or new evidence casting a serious doubt on the validity of the prior finding [citation]. The prior finding was based on a thorough inquiry into [the] defendant's competency, and the evaluations made at that time and the verdict of competency must be viewed as a baseline that, absent a preliminary showing of substantially changed circumstances, eliminated the need to start the process anew. As the prosecutor argued to the trial court following the testimony at the informal inquiry, the question has 'been resolved by a jury trial. [The defense expert] merely disagrees with that result.' [The d]efendant failed to show a substantial change of circumstances. Therefore we sustain the trial court's ruling, and conclude that [the] defendant's due process claims lack merit. [Citations.]" (*Huggins, supra*, 38 Cal.4th at p. 220.)

The same analysis applies here. The trial court denied Banda's motion because it did not find "any substantial new evidence that would justify a new trial in this matter regarding [Banda's] competency." Before stating its ruling, the court discussed the new reports by Silva and Weinstein, Middleton's and Lundgren's responses to the new reports, and Greenspan's critique of those responses. The court quoted part of Greenspan's letter, including the following: "[A] competence evaluation is a task performed independently by each expert, and one expert is not required to defer to another expert's opinion regarding competence.... *Determination of competence is not an exact science, and experts can and often do differ in their conclusions.* That is the reason for having multiple evaluators conduct such ... assessments.'" (Italics added.)

The court then observed, "Essentially, we're left with the same conflicting opinions we had at the trial, wherein the jury after hearing the testimony of the various doctors and observing the videotape of [Banda] during the initial interview found [Banda] competent." The court noted that Banda's attorney was describing the same problems with Banda (inability to communicate and lack of understanding) that he had claimed at the first competency trial, but the jury found Banda competent. Weinstein had not changed his opinion since the trial, and neither had Middleton or Lundgren. "So," the

court concluded, “there is no substantial new evidence or event that’s occurred here that justifies a new trial regarding competency.”

As in *Huggins*, the jury’s finding that Banda was competent “was based on a thorough inquiry into [his] competency, and the evaluations made at that time and the verdict of competency must be viewed as a baseline that, absent a preliminary showing of substantially changed circumstances, eliminated the need to start the process anew.” (*Huggins, supra*, 38 Cal.4th at p. 220.) At the competency trial, evidence was presented that Banda was mentally retarded, that he experienced auditory and visual hallucinations, and that he did not understand legal concepts even though he made good effort. Banda’s attorney cross-examined Middleton and Lundgren, questioning their understanding of mental retardation and the standard for competence, and Weinstein criticized their use of the KBIT intelligence test and disagreed with their conclusions that Banda was not mentally retarded and was competent. The jury heard this evidence and found Banda competent to stand trial.

Banda’s new evidence, consisting of the reports by Silva and Weinstein and Greenspan’s letter, was not so compelling as to *require* a second competency hearing. Middleton opined that the QEEG report was not relevant, Lundgren opined that it was not reliable or useful, and Banda’s attorney acknowledged the use of QEEG testing in criminal cases is “controversial” and he was only relying on the results to “buttress” his position that Banda “is different than most other people.” On this record, we cannot say the QEEG report established a substantial change of circumstance or cast serious doubt on the validity of the prior finding of competence as a matter of law. The information that Banda sometimes heard his attorney’s disembodied voice and then would become confused about his trustworthiness was not categorically a substantial change of circumstance or new evidence either. Banda previously reported that he heard the voices of people he knows and the voices make him mad; so hearing the voice of his attorney was not, by itself, a substantial change of circumstance. Silva’s report also noted that

Banda said he interacted well with, and often trusted, his attorney, and neither Silva nor Weinstein cited Banda's mistrust of his attorney as a reason he was unable to assist in his defense. Rather, Silva and Weinstein relied on Banda's poor cognitive abilities (mental retardation) and psychotic disorder in concluding he was incompetent. The new evidence merely showed that defense expert Silva disagreed with, and defense expert Weinstein continued to disagree with, the opinions of Middleton and Lundgren and the jury's finding of competence. (See *Huggins, supra*, 38 Cal.4th at p. 220.)

As Greenspan wrote, determination of competence is not an exact science, and experts often differ in their conclusions. (Cf. *Ake v. Oklahoma* (1985) 470 U.S. 68, 81 ["Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms ...."].) Given that the new reports did not change the opinions of Middleton and Lundgren that Banda was competent, evidence that Weinstein and Silva reached different conclusions was not sufficient to require a finding of "substantial change of circumstances or new evidence ... casting serious doubt on the validity of the prior finding of the defendant's competence." (*People v. Medina, supra*, 11 Cal.4th at p. 734.) Therefore, under either substantial-evidence or abuse-of-discretion review, we conclude the trial court did not err when it ruled that a second competency trial was not warranted.

## ***II. Permitting the prosecutor to question a defense expert about malingering***

Banda contends the trial court erred during the trial on guilt by allowing the prosecutor to ask questions of Greenspan about "Banda allegedly faking his mental retardation" after the trial court found Banda mentally retarded in the *Atkins* hearing. (Capitalization omitted.) We find no error and, even assuming error, there was no harm.

### **A. Background**

In the trial on guilt, the defense conceded that Banda shot Haws, but took the position that his mental retardation and psychosis affected his ability to premeditate and deliberate. In her opening statement, Banda's attorney told the jury the fact that Banda was mentally retarded had been established in a court of law, referring to the court's finding in the *Atkins* hearing.

The defense called Greenspan as an expert witness, and he testified about mental retardation in general and his diagnosis that Banda was mentally retarded specifically. Greenspan told the jury that individuals with mental retardation are very gullible, they are at higher risk of having mental illness, they almost always have problems in executive functioning, they often have memory problems, and they "have great difficulty in planning." Further, "people with mental retardation are often described as impulsive, but their impulsivity ... may reflect overall brain damage, which often causes people to be impulsive, it's more likely to reflect confusion." He testified that, as a rule, mental retardation affects the ability to form intention and act intentionally.

Greenspan explained that he testified in an earlier proceeding in the same case, the *Atkins* hearing, which resulted in Banda being found to be mentally retarded and the death penalty being "take[n] off the table." He based his diagnosis of mental retardation in part on an intelligence test he gave; Banda scored in the second percentile. Greenspan also relied on reports written by Weinstein and Silva and school records. These records showed, for example, that in the ninth or 10th grade, Banda scored in the first percentile in math. It was reported that Banda's brother got him a job that involved "very simple sorting of produce," but he could not do it. His supervisor tried very hard to work with him, but she finally gave up and let him go. Banda did not understand that he had been fired and kept showing up at work. In addition, QEEG data showed some evidence of brain damage, and "it's very likely that [Banda] has an impaired brain, that his brain doesn't work, isn't wired properly."

In cross-examination, the prosecutor asked Greenspan about whether he reviewed reports by Middleton and Lundgren as well. After establishing that Middleton's testing showed Banda had an IQ of 73, the prosecutor asked whether 70 is the usual cutoff for mental retardation. At this point, Banda's attorney objected on the ground the prosecutor was trying to relitigate the issue whether Banda was mentally retarded. The trial court stated that it was overruling the objection, but after Greenspan responded that a score of approximately 70 means between 70 and 75 and the KBIT is not a valid and comprehensive IQ test, the court admonished the jury as follows:

“Ladies and gentlemen, this Court has already heard evidence regarding whether or not [Banda] is mentally retarded. What that means in terms of what his mental state was at the time of this incident, the killing of Detective Haws, that's for you to decide. You're going to decide that. *This Court has already made a finding that he is retarded, according to the law.* And then you use that in your determination as to what his mental state was at the time of the shooting of Detective Haws.” (Italics added.)

The prosecutor moved on to Weinstein's finding that Banda's IQ was 66 and asked, “So we're not talking [about] somebody who would be considered, even in your mind, anywhere near profoundly retarded?” Greenspan agreed that Banda was not profoundly retarded.

The prosecutor then asked about malingering, which Greenspan explained involves a person “try[ing] to exaggerate certain symptoms in the direction that will benefit his legal case.” Greenspan confirmed that the DSM states malingering should be strongly suspected when the person has been referred by an attorney and when the person has antisocial personality disorder. The prosecutor elicited testimony from Greenspan that he did not consider whether Banda had antisocial personality disorder because that was not his job; he was asked to consider whether Banda was mentally retarded. The prosecutor also elicited testimony about an instance of Banda lying about a fact related to

the crime. Banda told Greenspan he got the gun from his brother's drawer,<sup>16</sup> but he told Shade he paid \$130 for the gun and bought it from a gangster. Greenspan agreed that a person who is mentally retarded is capable of lying, but he speculated that Banda lied about the gun to Shade because he did not want his brother to get in trouble.

The next day of trial after Greenspan testified, Banda moved for a mistrial based on the prosecutor having raised the issue of malingering in cross-examining Greenspan. Banda's attorney argued that, because malingering was only relevant to the diagnosis of mental retardation and the court had already ruled that Banda was mentally retarded, the prosecutor's questions regarding malingering improperly challenged the finding that Banda was mentally retarded.<sup>17</sup>

The trial court disagreed: "Malingering goes to whether or not a defendant might not do the best job they can in doing the testing or they might have certain affects that the defendant might exhibit that really don't exist. And all that, along with all the other findings and testing, can be considered by the jury. I mean, we all know that there's different degrees of mental retardation.... [B]ut [malingering] doesn't affect whether or not I found him to be retarded." The court further explained: "[T]he issue isn't just mental retardation. It's premeditation and deliberation. [The prosecutor] is trying to show [Banda] can premeditate and deliberate and plan the killing of Detective Haws. And you're putting on mental retardation [evidence] to show that he doesn't really have that capacity. And so malingering, his ability to manipulate, I've already found him retarded. That doesn't mean he can't premeditate and deliberate."

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<sup>16</sup> A search of Fernando's house yielded a gun case and box of .25 caliber cartridges, which was originally a 50-cartridge box and contained 13 live rounds.

<sup>17</sup> Banda's attorney claimed the jury would understand the prosecutor's questioning as suggesting that Banda was malingering with respect to his intellectual abilities because Greenspan testified only about mental retardation and did not mention psychosis. Banda's attorney acknowledged, however, that the prosecutor was free to ask about malingering in the context of Banda's psychotic symptoms. She told the court, "I understand when Dr. Silva testifies or anyone testifies about psychosis, the issue of malingering is open."

Banda's attorney asked that the jury be instructed that, as to mental retardation, Banda was not malingering. Denying the request, the court stated:

"I didn't find he wasn't malingering. I found him to be retarded. That didn't mean that I found that he couldn't have malingered or been malingering. But the fact of the matter is that the evidence showed that he was mentally retarded. That doesn't mean that I found that he wasn't maybe exaggerating his condition. Maybe wasn't being quite upfront with his condition. I never said that he wasn't malingering. I said that he was mentally retarded. I don't think I ever said that. A person can be malingering and still be retarded."

**B. Analysis**

Banda contends the trial erred by allowing the prosecutor "to ask questions insinuating that ... Banda was faking his mental retardation symptoms." He relies on the doctrine of collateral estoppel, arguing that once the trial court found Banda was mentally retarded in the *Atkins* hearing, the prosecution was barred from relitigating the issue in the trial on guilt.

As a threshold matter, we question whether the doctrine of collateral estoppel applies in further proceedings in a single case. (See *People v. Santamaria* (1994) 8 Cal.4th 903, 913.) Collateral estoppel requires "'a final judgment on the merits,'" but there was no final judgment at the time of the trial on guilt. (*People v. Barragan* (2004) 32 Cal.4th 236, 253.)<sup>18</sup> The parties do not raise this issue, however, and we need not resolve it because, even if we assume the doctrine applies to further proceedings in a single case, Banda's claim fails.

"Under the doctrine of collateral estoppel, a party cannot relitigate an issue of ultimate fact that was determined by a valid and final judgment in a previous lawsuit between the same parties. [Citations.] In criminal cases, this doctrine is an aspect of the

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<sup>18</sup> We also note that the law of the case doctrine is no help to Banda because the doctrine applies to a rule of law stated by an appellate court (*People v. Barragan, supra*, 32 Cal.4th at p. 246), not a trial court determination.

Fifth Amendment's protection against double jeopardy. [Citations.] Collateral estoppel applies only if five requirements are met: (1) the relevant issue must be identical to that decided in the prior proceeding; (2) the issue actually must have been litigated in the prior proceeding; (3) the issue necessarily must have been decided in the prior proceeding; (4) the decision in the prior proceeding must be final and on the merits; and (5) the party against whom preclusion is sought must be identical to or in privity with the party to the prior proceeding. [Citations.]" (*People v. Yokely* (2010) 183 Cal.App.4th 1264, 1272–1273 (*Yokely*).)

The issue of ultimate fact determined by the trial court in the *Atkins* hearing was that Banda was mentally retarded. (See former § 1376, subd. (b)(2) ["the court or jury shall decide only the question of the defendant's mental retardation"].) Arguably then, the prosecutor could not relitigate the issue of mental retardation in the trial on guilt by advocating that Banda was not mentally retarded at all. But the severity of Banda's mental retardation and whether he may have been malingering are not identical to the issue decided in the *Atkins* hearing.

As the trial court stated, there are degrees of mental retardation and "[a] person can be malingering and still be retarded." Indeed, Banda's attorney recognized that the prosecutor was free to raise the issue of malingering with any witnesses who addressed Banda's psychosis. In other words, the parties agreed that whether Banda was malingering was proper subject for cross-examination, despite Banda's mental retardation. Since the court's prior finding that Banda was mentally retarded did not preclude the possibility that he was malingering, the prosecutor's questions about malingering did not amount to relitigation of the issue whether Banda was mentally retarded. Consequently, Banda's collateral-estoppel argument fails.

The California cases Banda relies upon are inapposite as they involve relitigation of an *identical* issue. (*People v. Sims* (1982) 32 Cal.3d 468, 485 [whether person committed welfare fraud]; *People v. Crivello* (2011) 200 Cal.App.4th 612, 617–618

[whether the defendant was a mentally disordered offender based on same underlying offense]; *People v. Francis* (2002) 98 Cal.App.4th 873, 879 [same].)<sup>19</sup>

Banda also cites the following statements made by the trial court when it announced its *Atkins* ruling:

“It is inconceivable to me that [Banda] could be so mentally challenged on one hand and no one claims that he’s not mentally challenged—yet bright enough to *fool test givers* experienced in determining if [he] is malingering. There is nothing in [Banda’s] history to indicate he has the mental acuity to *rig the test*. He is well within the range of mental retardation.” (Italics added.)

Based on these statements, Banda argues the trial court was incorrect when it later stated in the guilt phase: “I didn’t find he wasn’t malingering.” Given the court’s further comment at the guilt trial that its finding of mental retardation “doesn’t mean that I found that he wasn’t maybe exaggerating his condition,” we question Banda’s interpretation of the court’s statements at the *Atkins* hearing. The court may have simply rejected the prosecutor’s theory that Banda’s intellectual ability was above the range for mental retardation and he purposely answered examiners’ questions in a way that tricked them into thinking he was mentally retarded. This is not the same as determining that Banda was mentally retarded *and* that he never exaggerated his condition nor gave less than his best effort in the various examinations.

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<sup>19</sup> Nor is *Ashe v. Swenson* (1970) 397 U.S. 436 helpful to Banda. In that case, after the defendant was acquitted of robbery of one victim, the state attempted to try him for robbery again based on the same underlying incident but as to a different robbery victim. (*Id.* at pp. 437–439.) The United States Supreme Court held the Fifth Amendment guarantee against double jeopardy barred the second trial, concluding that, “after a jury determined by its verdict that the [defendant] was not one of the robbers,” the state could not hale him before a new jury to litigate the issue again with respect to a different victim. (*Id.* at p. 446.) The instant case is not analogous. Here, the trial court found in the *Atkins* hearing that Banda was mentally retarded and, as a result, the prosecution could not seek the death penalty. In the subsequent guilt phase of trial, Banda was, *for the first time*, tried for murder. There was no double jeopardy issue, and whether Banda was mentally retarded and therefore not subject to the death penalty was not relitigated by the prosecutor in the guilt trial.

In any event, even if we assume the trial court did find that Banda was not malingering with respect to his intellectual disability, this does not mean collateral estoppel applies. The only “issue of ultimate fact that was determined” in the *Atkins* hearing was that Banda was mentally retarded. (*Yokely, supra*, 183 Cal.App.4th at p. 1272; former § 1376, subd. (b)(2).) Banda cites no authority for the proposition that the doctrine of collateral estoppel bars a party from litigating issues *other* than the ultimate fact that was determined in the prior proceeding. If, for example, the trial court had stated in its *Atkins* ruling that it found Greenspan’s testimony credible and persuasive, we doubt Banda would have argued the prosecutor was therefore barred from asking any questions relevant to Greenspan’s credibility in the subsequent trial on guilt because his credibility and persuasiveness had been established in the *Atkins* hearing.

Finally, assuming for the sake of argument that it was improper to allow the prosecutor to question Greenspan about malingering, we see no prejudice. The court admonished the jury that Banda already had been determined to be mentally retarded and that fact was to be used in the jury’s determination of his mental state at the time of the shooting. We presume the jury followed the court’s admonition and any potential prejudice was therefore avoided. (See *People v. Bennett, supra*, 45 Cal.4th at p. 595.)

### ***III. Alleged prosecutorial misconduct***

Banda next asserts the prosecutor engaged in misconduct by disparaging the defense experts, pursuing a malingering theory, and raising issues related to the death penalty. We are not persuaded.

#### ***A. Argument “impugning the defense team”***

The prosecutor began his cross-examination of defense expert Silva by asking about his compensation. Silva already had been paid \$38,000 for his work on the case, he charged \$250 per hour, and he was going to bill \$2,000 for the day he was testifying. Banda agrees this line of questioning was not improper. (See Evid. Code, § 722, subd. (b).) But he asserts, “the prosecutor crossed the line when he argued ... Silva had

to come up with something to help ... Banda because he had been paid \$41,000” and “Silva had an interest in the outcome of the case because he had been paid.”

Preliminarily, this argument has been forfeited because Banda did not object to the prosecutor’s arguments or seek curative admonition at trial. (See *People v. Parson* (2008) 44 Cal.4th 332, 359 (*Parson*).) Furthermore, the claim fails on the merits.

“Although prosecutorial arguments may not denigrate opposing *counsel’s* integrity, ‘harsh and colorful attacks on the credibility of opposing *witnesses* are permissible. [Citations.]’ [Citation.] Moreover, a prosecutor ‘is free to remind the jurors that a paid witness may accordingly be biased and is also allowed to argue, from the evidence, that a witness’s testimony is unbelievable, unsound, or even a patent “lie.”’ [Citations.]” (*Parson, supra*, 44 Cal.4th at p. 360.) A prosecutor “is not precluded from reminding the jurors that the expert’s findings support the goals of the party who called him, and may therefore not be objective.” (*People v. Arias* (1996) 13 Cal.4th 92, 182 (*Arias*).) Nor is it improper for a prosecutor to suggest “the ‘defense team’ may have sought an expert whose technical opinions would be favorable to [the] defendant’s case.” “An argumentative reminder that defense counsel may have chosen [an expert] for this reason [i.e., the expert’s opinions are favorable to the defense] is not equivalent to an insinuation that counsel suborned perjury or engaged in deception.” (*Ibid.*)

Our Supreme Court found no misconduct where a prosecutor told the jury an expert psychiatrist’s “conclusions amounted to ‘psychobabble’” and said another defense expert was “‘*not a Ph.D.* [¶] *He’s a spin doctor.* He’s like these guys you see on TV who go down and talk to the political reporters, this is what we really want to say, and just kind of spin it around so it comes out the way they want it.’” (*Parson, supra*, 44 Cal.4th at pp. 359–360.) Similarly, it was not misconduct where a prosecutor described a defense expert “as a ‘so-called expert, so-called because a real scientist would never stretch any [principle] for a buck.’” (*Arias, supra*, 13 Cal.4th at p. 162.)

In light of these examples of attacks on defense expert witnesses, which did not cross the line into misconduct, we conclude the prosecutor's arguments challenging the defense experts' credibility in this case did not amount to misconduct. Banda's citation to out-of-state authority for the proposition that it is misconduct to attack an expert witness based on his or her compensation is unavailing. We are required to follow the California Supreme Court, which has held it is not improper for a prosecutor to accuse an expert witness of "stretch[ing] any [principle] for a buck." (*Arias, supra*, 13 Cal.4th at p. 162; see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

***B. Questions suggesting Banda was malingering***

Banda claims the prosecutor "improperly insinuated through cross examination and argument that the prosecution had evidence ... Banda was faking his mental retardation." However, in the section of his brief in which he makes this claim, he provides no citations to the record of any instances of alleged improper insinuation. To the extent Banda relies on the same questions he cites in support of his argument that the trial court erred by permitting cross-examination of Greenspan about malingering (see part II., above), we reject the claim.

First, although Banda accuses the prosecutor of suggesting Banda was "faking" his mental retardation by asking about malingering, Greenspan defined malingering as trying to "exaggerate certain symptoms." As the trial court explained, exaggerating (as opposed to faking) could include a person who has an intellectual disability "not do[ing] the best job [he] can" or otherwise presenting himself as more intellectually impaired than he actually is. The trial court also observed that there are degrees of mental retardation. (See *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1132 ["According to the DSM-IV, '[f]our degrees of severity can be specified, reflecting the level of intellectual impairment: Mild, Moderate, Severe, and Profound,' with mild mental retardation occurring with an IQ of '50-55 to approximately 70.'"].) The prosecutor asked Greenspan about Banda's level of intellectual impairment (Greenspan

agreed he was not “anywhere near profoundly retarded”) presumably because mild mental retardation would likely have less impact on a person’s ability to form intent and to premeditate than profound mental retardation would have. Thus, the prosecutor’s questions about Banda’s level of impairment and possible malingering were relevant to determining Banda’s state of mind at the time of the shooting, even after the jury accepted the court’s finding of fact that he was mentally retarded. It is not misconduct to ask about topics relevant to an issue at trial.

Second, Banda claims the prosecutor insinuated *he had evidence* of Banda faking mental retardation, but we have found no such insinuation in the prosecutor’s cross-examination of Greenspan. In support of his claim, Banda cites *People v. Wagner* (1975) 13 Cal.3d 612, 619. In that case, the defendant was charged with selling marijuana on a single occasion in 1972, but the prosecutor asked the defendant a series of questions suggesting the defendant was involved in other specific drug sales. (*Id.* at pp. 615–616.) For example, the prosecutor asked, “‘Isn’t it true that you have in fact sold heroin?’” and “‘Isn’t it true that on December 30, 1971, that you have received ... a shipment of “pure pharmacy” cocaine?’” (*Id.* at p. 616.) The defendant answered each question in the negative, and the prosecutor failed to introduce any evidence substantiating the charges implied by his questions. (*Id.* at p. 617.) Our high court held this line of questioning was improper, and the fact that the prosecutor’s questions elicited negative answers did not cure the misconduct. The court explained: “By their very nature[,] the questions suggested to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question. The rule is well established that the prosecuting attorney may not interrogate witnesses solely ‘for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given.’ [Citations.]” (*Id.* at p. 619.)

Banda also cites *People v. Bolton* (1979) 23 Cal.3d 208, 212, in which the prosecutor “hinted [in closing argument] that, but for certain rules of evidence that shielded [the defendant], he could show that [the defendant] was a man with a record of prior convictions or with a propensity for wrongful acts.” The court held the prosecutor’s argument was improper because “he was attempting to smuggle in by inference claims that could not be argued openly and legally. In essence, the prosecutor invited the jury to speculate about—and possibly base a verdict upon—‘evidence’ never presented at trial. [The defendant], in fact, had no prior criminal record.” (*Ibid.*)

The Attorney General points out that the prosecutor in this case could properly cross-examine the defense experts on the subject to which their testimony related, the matter upon which their opinions were based, and the reasons for their opinions. (Evid. Code, § 721, subd. (a).) That appears to be what occurred in the cross-examination of Greenspan. Nothing Banda cites in the trial record demonstrates that the prosecutor suggested he had a source of information unknown to the jury or that he attempted to smuggle in by inference improper argument or inadmissible evidence. Accordingly, we conclude the prosecutor’s questioning of Greenspan did not constitute misconduct.

Moreover, as discussed above, the court admonished the jury that Banda already had been determined to be mentally retarded and, therefore, we discern no prejudice.

### ***C. Questions related to the death penalty***

Banda argues the prosecutor engaged in misconduct by asking questions about the death penalty. We disagree.

Banda cites questions the prosecutor asked of Silva and Fernando, and responses from Fernando in which the death penalty was mentioned. Banda has forfeited any argument based on these questions because in no instance did Banda’s attorney object to the questions at trial. (*People v. Tully, supra*, 54 Cal.4th at p. 1013.) Further, the references to the death penalty arose in the discussion of two recorded telephone conversations between Banda and his siblings in which Banda himself talked about the

death penalty. Banda makes no claim that the recorded conversations themselves were not proper subjects of inquiry. In this context, we see no misconduct in the prosecutor referring to the death penalty in asking questions about the recorded conversations.

In his cross-examination of Greenspan, the prosecutor asked whether he had a bias against the death penalty, and Greenspan responded that he did not. Greenspan agreed that, in the *Atkins* hearing, he testified he was “‘sort of mildly against’” the death penalty. He explained, however, “If you read the whole quote, what I said was at one time I was very much in favor of it and now I’m more neutral on it, primarily because of the cost of these kinds of proceedings.” Later, in redirect examination, Greenspan read to the jury the entire response he gave at the *Atkins* hearing when asked his opinion of the death penalty:

“‘I’ve never taken a public position on the death penalty. Like most people, my views have changed. At one time, I was very much in favor of it. Now, I have reservations, particularly due to the high cost of these kinds of proceedings, the long time span in which people stay on death row, and the inequities that I see in many cases where one person will get the death penalty and one will not. In some cases, the one getting the death penalty being less culpable .... And so I’d say now I’m sort of mildly against it, but not so sufficiently as to cause me to lose my objectivity.’”

In his closing argument, the prosecutor argued Greenspan made an inconsistent statement and lied when he first said he did not have a bias against the death penalty and then admitted he was mildly against it.

After Banda was found guilty of the charged offenses and sane at the time of the shooting, he moved for a new trial. Among other things, he argued the trial court erred when it permitted cross-examination on Greenspan’s feelings about the death penalty. In denying the motion, the court stated:

“I don’t find that that line of questioning [about Greenspan’s opinion of the death penalty] is unreasonable. Even though this isn’t a death penalty case, questions regarding—are relevant to bias or philosophy, which might indicate that the witness favors defendants. But Dr. Greenspan’s response

was he at one time supported the death penalty, that with time he's kind of changed his opinion .... And there were a lot of different reasons why he's come to a somewhat ambiguous feeling about the death penalty. He doesn't really approve of it now.... So I really don't think that was—a jury would really give that any reasonable weight in terms of affecting their opinion of Dr. Greenspan....”

On appeal, Banda argues the prosecutor's questioning was improper because the death penalty is a highly inflammatory issue with no relevance to the guilt trial. The Attorney General takes the position the questioning was relevant to whether Greenspan had a bias and, in any event, there was no prejudice. We believe the prosecutor's questioning on the death penalty was not appropriate. While Greenspan's opinion on the death penalty would be relevant to show bias in the *Atkins* hearing since a finding of mental retardation would bar the prosecution from seeking the death penalty, we fail to see its relevance in the trial on guilt after those issues had been decided. However, we agree with the Attorney General that the prosecutor's conduct was harmless.

Banda argues the prosecutor's questions regarding the death penalty were prejudicial because “discussing the death penalty at all had the strong likelihood of encouraging jurors to convict to make up for the fact that ... Banda had already escaped the death penalty for an emotionally charged crime—the unprovoked killing of a police officer.” Greenspan testified in direct examination that Banda was found mentally retarded and the death penalty was taken off the table in the prior *Atkins* hearing. Thus, the jury was aware of the fact that Banda was not subject to the death penalty as a result of his mental retardation before the prosecutor asked Greenspan his opinion on the death penalty. The jury was instructed that it could not “consider or discuss penalty or punishment in any way when deciding whether a special circumstance, or any other charge, ha[d] been proved.” (CALCRIM No. 706.) We presume the jury followed the court's instructions and did not consider penalty or punishment in reaching its verdict. (See *People v. Gonzales* (2011) 51 Cal.4th 894, 940.) In addition, we agree with the trial court that Greenspan's “somewhat ambiguous feeling about the death penalty” was not

reasonably likely to affect the weight the jury gave his testimony. Accordingly, we conclude it is not reasonably probable a result more favorable to Banda would have been reached absent the prosecutor's questions of Greenspan regarding any bias against the death penalty. (See *Arias*, *supra*, 13 Cal.4th at p. 161; *People v. Uribe* (2011) 199 Cal.App.4th 836, 873 ["It is a fundamental principle that reversal for prosecutorial misconduct is not required unless the defendant can show that he has suffered prejudice."].)

Finally, because the trial court admonished the jury about the finding that Banda was mentally retarded and Greenspan's opinion on the death penalty was unlikely to arouse strong reactions from the jury, we reject Banda's claim that cumulative misconduct resulted in prejudice.

#### ***IV. Sufficiency of evidence supporting gang allegations***

Banda challenges the sufficiency of the evidence to support the gang special circumstance and the gang enhancement. He contends there was no substantial evidence that he was an active participant in a gang at the time of the shooting, that he intended to further gang activities when he shot and killed Haws, or that he had knowledge of the gang's pattern of criminal activity. We conclude there was insufficient evidence to sustain the true findings for the gang special circumstance and gang enhancement.

##### ***A. Evidence***

On October 10, 2006, Tulare County probation officer Sally Vanciel had contact with Banda. She talked to Banda about gang affiliation, asking him "what he claimed." According to Vanciel, Banda "said he claimed BTL, the letters, which stands for Big Time Locs, a [S]outhern gang out of Cutler/Orosi."

In August 2005, probation officer Armando Villarreal filled out an intake form for Banda, which included a checklist on gang affiliation. Banda said he was affiliated with OGS, which stands for Original Gangsters Sureños, a Southern gang based in the

Cutler/Orosi area. Villarreal checked ““affiliated”” and ““friends belong”” on the intake form; he did not check the options for ““none”” or ““member.””

In a report prepared in November 2005, probation officer Santos wrote that Banda said he affiliated with Southerners but did not specify a clique. Santos also spoke to Banda’s mother with another officer serving as a Spanish-language interpreter. Santos wrote that Banda’s mother had concerns because it appeared Banda was a member of a gang.

Joe Aguilar worked in the gang unit of the Tulare County Sheriff’s Department from 1995 until he retired in 2008. On January 14, 2003, Aguilar met Banda at Orosi High School. The principal of the high school had asked Aguilar to contact Banda because of reports he was involved with a gang. Banda was also reported as a runaway. Aguilar testified he went to Banda’s house and “found out it was in fact a gang hangout,” and, “[a]fter talking to neighbors found out there was a lot of gang activity.”

Banda told Aguilar he hung out with gang members and knew several gang members, but he denied being a gang member. Aguilar testified that Banda claimed OGS and BTL and indicated he “backed [S]outhern gang members,” meaning if they were involved in a fight, he would join them. Banda said he associated with Andreas Cardenas, who gave him drugs and “would hide him from his parents.” Cardenas lived three blocks from the high school in Orosi. Aguilar filled out a field identification (FI) card for Banda.

On September 15, 2006, Banda filled out part of an inmate classification form. Asked to list all known enemies, Banda wrote ““All of you.”” Greg Gibson, who was processing inmates at the main jail understood ““you”” to mean persons in uniform. Banda also told Gibson he affiliated with Southerners. Gibson filled out the gang affiliation information on the form, and he did not circle ““gang member,”” ““associate,”” or ““vendettas”” for Banda.

Sanchez, a patrol supervisor with the Tulare County Sheriff's Department, worked in the gang unit from 2004 to 2009 and testified as a gang expert. BTL was the original Sureño gang in the Cutler/Orosi area in the 1980's. In the 1990's, some of their members branched off and started OGS. For the most part, the two subsets get along and back each other up. Their common enemy is Northern gang members. Sanchez agreed that "they occasionally consider law enforcement their enemy." They associate with the color blue, the letter M, and the number 13. Three dots is a common gang tattoo.

Sanchez explained that the county jails are segregated so that all Northerners are in one housing unit and the Southerners are in other housing units. If a person unaffiliated with any gang is housed with a gang in a housing unit, that person would have to follow the gang's "house rules," which could mean paying tribute with the commissary. The shot caller, or inmate "who is taking charge of the custodial facility for that particular gang," would then distribute commissary items to "their own gang." In this case, during a recorded telephone call, Banda "told his brother that he was being taken care of by the homies." A few days after the phone call, an officer conducted a search and found extra commissary items that Banda had not purchased in his cell. Sanchez testified that the commissary items showed Banda "got some notoriety from his gang and that he's got some prestige now over the crime that he committed. Therefore, they are helping him out in a situation of need because he doesn't have the funds to purchase those types of items ...."

Sanchez gave his opinion that Banda was a Sureño gang member. He reviewed the following information on Banda: Aguilar's FI card, Banda's recorded interview,<sup>20</sup> Banda's tattoo, a probation report, and jail classification information. Sanchez testified that Banda "advised [him] that as a [S]outherner, he would back up his homies during

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<sup>20</sup> More than halfway through the interview, Sanchez joined Shade in the interview room. He asked Banda about his gang involvement and spoke in English.

fight with rival gangs.” He continued, “Unfortunately, none of those were ever documented, which is not uncommon.”

The prosecutor asked Sanchez whether he had “an opinion about this crime in relationship to his gang membership.” He responded:

“Yes. Gang members are often armed, and they’re armed for quick retaliation and to commit crimes. It’s instilled in them as gang members to be violent. This particular instance, he was dressed down as a gang member in my opinion with the clothing that he had on, a dark blue shirt. He had baggy jean shorts on with his socks rolled up to above his knees, which is a way that gang members will wear their attire. The fact that he was armed with a firearm while out committing a crime, and the fact that he had the gang-related tattoos and self-admitted to being a Sureño gang member, it was my opinion that he was an active [S]outhern gang member at the time of the crime.”

Sanchez then testified about how this crime would benefit the gang:

“Well, it benefits the gang because obviously he got notoriety within his gang. It was ... a type of crime [that] was in the newspapers. It was known that he was a gang member. So the notoriety that the gang would get would also [instill] fear within the community with other officers showing that the gang is violent. Not only are they willing to commit crimes against their rival gang members, but now they’re turning the page onto officers as well. So in the future, if the community gets involved in any type of gang crimes, they’re going to be less likely to ... communicate with law enforcement, become witnesses, stay as a victim because they’re afraid of some type of retaliation. If they know that a [S]outhern gang member has committed a murder against a peace officer, then what type of crime are they going to be willing to do against just a normal citizen who is not armed? So that’s how I see it benefits the gang itself.”

Sanchez testified he was familiar with gang members talking about these kinds of crimes and such crimes bring status to the gang and the person who commits violent crimes. The parties stipulated that BTL, OGS, and Sureños were criminal street gangs as defined by the Penal Code.

**B. Standard of review**

In assessing a claim of insufficiency of the evidence, “we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt.” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) “The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.... A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support”’ the jury’s verdict. [Citation.]” (*Ibid.*)

The same standard applies where the prosecution relies primarily on circumstantial evidence, and we accept any logical inferences the jury could have drawn from the circumstantial evidence. “[I]t is the jury, not the appellate court that must be convinced of the defendant’s guilt beyond a reasonable doubt. [Citation.]’ [Citation.]” (*People v. Zamudio, supra*, 43 Cal.4th at pp. 357–358.)

**C. Gang special circumstance**

Under section 190.2, subdivision (a), “[t]he penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the ... [enumerated] special circumstances” is found to be true.

The jury in this case found true the gang special circumstance, which requires the following: “The defendant intentionally killed the victim [1] while the defendant was an *active participant* in a criminal street gang, as defined in subdivision (f) of Section 186.22, and [2] the murder was carried out *to further the activities* of the criminal street gang.” (§ 190.2, subd. (a)(22), italics added.)

In addition, because “[c]riminal punishment based on active participation in a criminal gang requires knowledge of the gang’s illegal purposes,” the jury was also required to find “‘the defendant *knew* that members of a gang engaged in or have engaged in a pattern of criminal gang activity.’” (*People v. Carr* (2010) 190 Cal.App.4th 475, 488 & fn. 13, italics added (*Carr*); CALCRIM No. 736.)

Banda contends the prosecution presented no substantial evidence to support any of the three gang-related elements: (1) active participation, (2) intent to further gang activities, and (3) knowledge of the gang’s pattern of criminal activity. We agree there was insufficient evidence to support the gang special circumstance under section 190.2, subdivision (a)(22), and reverse the jury’s true finding.

***1. Active participation in a criminal street gang***

The jury was required to find that Banda killed Haws while he was “an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22.” (§ 190.2, subd. (a)(22).)<sup>21</sup> The jury was instructed: “*Active participation* means involvement with a criminal street gang in a way that is more than passive or in name only. [¶] The People do not have to prove that [Banda] devoted all or a substantial part of his time or efforts to the gang, or that he was an actual member of the gang.” (CALCRIM No. 736.)

In *People v. Castenada* (2000) 23 Cal.4th 743, 747 (*Castenada*), our Supreme Court construed the phrase “‘actively participates in any criminal street gang’” as used in section 186.22, subdivision (a), to mean “involvement with a criminal street gang that is more than nominal or passive.”<sup>22</sup> The court relied on the usual and ordinary meaning of

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<sup>21</sup> Section 186.22, subdivision (f), sets forth the elements required to establish the existence of a “‘criminal street gang.’” The parties stipulated at trial that BTL, OGS, and Sureños all qualify as criminal street gangs.

<sup>22</sup> Section 186.22, subdivision (a), provides: “Any person who *actively participates in any criminal street gang* with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal

“‘actively’” as “‘being in a state of action; not passive or quiescent’ [citation]” and “‘characterized by action rather than contemplation or speculation’ [citation]” and “‘participates’” as “‘to take part in something (as an enterprise or activity).’ [Citation.]” (*Castaneda, supra*, at p. 747.)

In *Castaneda*, the defendant committed an armed robbery and attempted robbery with two companions in Goldenwest gang territory. (*Castaneda, supra*, 23 Cal.4th at p. 745.) In the 14 months prior to the crimes, police officers saw the defendant in the presence of known Goldenwest gang members seven times. On at least three of those occasions, the police gave the defendant written notice that Goldenwest was a criminal street gang, and, at those times, the defendant “bragged to the officers that he ‘kicked back’ with Goldenwest members and ‘backed [them] up,’ but he denied having been initiated into the gang.” (*Id.* at p. 746.) A gang expert testified the robbery was “typical of crimes committed by Goldenwest gang members, who see their crimes as a means of putting local residents on notice of the gang’s control of the neighborhood.” (*Ibid.*)

The Supreme Court concluded this was sufficient evidence to show the defendant’s involvement with the Goldenwest gang was “more than nominal or passive.” (*Castaneda, supra*, 23 Cal.4th at p. 752.) The court relied in part on the fact that the defendant did not dispute that his offenses promoted, furthered, or assisted, the criminal conduct of the Goldenwest gang and he did not contest the finding that the offenses were

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conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.” (*Italics added.*)

The parties assume that cases interpreting the phrase “actively participates in any criminal street gang” for purposes of section 186.22 are applicable to interpret the phrase “active participant in a criminal street gang” as used in section 190.2, subdivision (a)(22). Because the statutes share a similar purpose (to address gang crime) and similar language, we agree that such cases are highly relevant to our understanding of the phrase “active participant in a criminal street gang.” (Cf. *People v. Carr, supra*, 190 Cal.App.4th at p. 489, fn. 14 [citing facts of *Castaneda* to support conclusion of sufficient evidence of active participation in a criminal street gang under section 190.2, subdivision (a)(22)].)

committed for the benefit of, at the direction of, or in association with a criminal street gang. The court explained:

“To summarize, through evidence of the crimes [the] defendant here committed, his many contacts on previous occasions with the Goldenwest criminal street gang, and his admissions by bragging to police officers on those occasions of gang association or membership, the prosecution presented sufficient proof that [the] defendant ‘actively participate[d]’ in a criminal street gang within the meaning of section 186.22[, subdivision ](a).” (*Castaneda, supra*, at p. 753.)

Distinguishing the facts of *Castaneda*, Banda points out there was no evidence in this case that he was ever contacted by the police while in the company of gang members. He further asserts, “[n]o matter how hard Detective Sanchez tried to get ... Banda to admit some actual involvement in the gang, ... Banda refused.” Having reviewed the postshooting interview, we agree that Banda did not personally describe any gang involvement that was more than nominal or passive, and we see no evidence that he “bragged” of any gang activity. Sanchez asked which group Banda hung out with in high school, OGS or BTL, and Banda replied, “Any one.” But when asked which one he “g[o]t jumped into,” Banda responded, “None of them.” Banda admitted that he had said he was a Southerner the last couple times he had been arrested, but when asked what he “claim[ed],” Banda replied, “I just said a Southerner and that’s it.”<sup>23</sup> Sanchez asked, “Why did you say you were a Southerner? Just because you hang out with them or because you back them up?” Banda said, “Yeah.” Sanchez asked, “So you back them up if they get into fights with Northerners?” Banda said, “Yeah.” However, there was no evidence that Banda actually fought Northerners or otherwise “backed” Southerners.

Sanchez asked whether Banda had problems with Northerners when he lived with his parents in Cutler. Banda said, “[T]hey would ask me what I claimed and I would say I didn’t.” He admitted he got a tattoo of three dots “[a] long time ago,” “[l]ike a year

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<sup>23</sup> We also note that no evidence was presented suggesting Banda’s prior arrests involved gang-related offenses.

ago,” but denied it meant he was initiated in a gang.<sup>24</sup> Sanchez asked Banda what the Southerners in jail were going to think about the crime and whether they would look up to him because “you took their business out in the street.” Banda responded that they would not look up to him and said, “They won’t say nothing.” Sanchez asked, “Aren’t they going to think that you’re a ‘bad ass’ because you shot an officer?” Banda responded, “No. They probably think you[’re] going to do time, bored, doing time.” Banda’s insistence that he would not gain status with any gang for shooting an officer is noteworthy in light of the fact he readily admitted that he shot Haws merely because he was “bored” and “fed up with it.” Banda also denied that he had gang nickname. When asked what he was called on the streets, he said he did not currently hang out with Southerners and when he had, they called him by his last name.

“It is not enough that a defendant ... actively participated in a criminal street gang at any point in time .... A defendant’s active participation must be shown at or reasonably near the time of the crime.” (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509.) Here, there was only one FI card on Banda, which was written almost five years prior to the shooting. Banda told probation officers at various times that he affiliated with BTL, OGS, or Southerners, but he denied being a gang member and apparently was not classified as a gang member by law enforcement.<sup>25</sup> We see little evidence of active

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<sup>24</sup> After Banda said he got the tattoo at “[s]ome fool[’s] house,” Sanchez asked, “Was that so he kind of initiated you in? Now you’re down with the gang, they gave you the three dots or what?” Banda responded, “Nah. Well—” Sanchez continued, “Not everybody gets three dots; right? I can’t get three dots.” Banda said, “I don’t know, but no. It’s because I needed to fix my tattoo and everything.” Banda agreed with Sanchez that the person who tattooed the three dots was a Southerner and that he got the tattoo at a “kickback where the homies were at just to kickback.” Later, Sanchez asked, “So you go to kickbacks all the time or once in a while?” Banda responded, “No, not really,” and denied that he was ever invited to kickbacks.

<sup>25</sup> Further, Banda’s response to an inmate classification form in September 2006 was likely inadmissible since he presumably was not given a *Miranda* (*Miranda v. Arizona* (1966) 384 U.S. 436) warning before being asked to fill out the form. (See *People v. Elizalde* (2015) 61 Cal.4th 523, 533–540 [unadmonished answers to booking questions about gang affiliation are inadmissible].)

participation in a criminal street gang by Banda at any time prior to the shooting, and there was no evidence of gang association within the year prior to the shooting.<sup>26</sup> (Cf. *Castenada*, *supra*, 23 Cal.4th at p. 746 [the defendant was seen seven times in presence of other gang members in 14 months prior to offense].)

Sanchez gave his expert opinion that Banda was “an active [S]outhern gang member” at the time of the shooting because Banda was armed, the crime was violent, he was “dressed down as a gang member,” he had “gang-related tattoos,” and he “self-admitted to being a Sureño gang member.” We observe that Banda never admitted to being a gang member, and the evidence indicates he had only one gang-related tattoo, the three dots. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 618 [gang expert’s opinion must be rooted in facts shown by evidence; “‘the expert’s opinion is no better than the facts on which it is based.’ [Citation.]”].)

In *Castenada*, the court found sufficient evidence of active participation based on (1) the defendant’s many prior contacts with gang members, (2) the defendant’s bragging to police officers of gang association or membership, and (3) “evidence of the crimes [the] defendant here committed.” (*Castenada*, *supra*, 23 Cal.4th at p. 753.)

We have observed that the facts of *Castenada* are distinguishable because Banda was never contacted by law enforcement while in the company of gang members and he did not brag of gang involvement. The evidence of the crime Banda committed is also distinguishable. Of most significance, unlike the defendant in *Castenada*, Banda does not concede that the crime was committed for the benefit of a criminal street gang. (Cf. *Castaneda*, *supra*, 23 Cal.4th at p. 753.) In addition, there was no evidence that the shooting occurred in gang territory, and there was no evidence that shooting a law enforcement official is “typical of crimes committed by ... gang members.” (*Id.* at

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<sup>26</sup> This takes into account Banda’s statement that he got the tattoo of three dots about a year before the shooting. The most recent admission of gang association to a probation officer occurred 14 months before the shooting.

p. 746.) Instead, Sanchez testified that the gang members are often armed and are instilled to be violent, but this does not mean that every person who commits a violent crime with a firearm is an active participant in a criminal street gang.

Sanchez also relied on the fact that Banda was wearing a dark blue shirt, baggy shorts, and rolled up socks at the time of the shooting, but he offered no other evidence of the usual indicia of a gang-related crime. For example, Banda did not call out a gang name or make a gang sign when committing the crime, he was not with other gang members at the time of the crime, and the victim was not from a rival gang. (Cf. *People v. Ochoa* (2009) 179 Cal.App.4th 650, 662, 665 (*Ochoa*) [no substantial evidence crimes were gang-related where, among other things, such indicia of gang-relatedness during the commission of the crimes were absent].) Given the lack of any other evidence suggesting active participation at or reasonably near the time of the shooting, we are unwilling to hold that Banda's dark blue shirt, baggy shorts, and high socks were sufficient evidence to support a finding he was an active participant in criminal street gang at the time of the shooting.

## **2. *Intent to further gang activities***

Banda also contends there was insufficient evidence to support the statutory requirement that "the murder was carried out to further the activities of the criminal street gang." (§ 190.2, subd. (a)(22).) "This language substantially parallels the language of section 186.22, subdivision (b)(1), which authorizes a sentencing enhancement for felonies 'committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members ....'" (*Carr, supra*, 190 Cal.App.4th at p. 488.) Accordingly, we look to case law discussing the sufficiency of the evidence to establish intent to

benefit a criminal street gang under section 186.22, subdivision (b)(1), to inform our substantial-evidence analysis.<sup>27</sup> (See *Carr*, *supra*, at pp. 488–489.)

Banda relies on *Ochoa*, *supra*, 179 Cal.App.4th at page 656, in which the Court of Appeal concluded there was insufficient evidence to support a gang enhancement. In *Ochoa*, the defendant did not challenge the jury’s determination that he was an active gang member, but he argued there was insufficient evidence to support the jury’s finding that he committed the underlying crimes of carjacking and weapon possession *for the benefit* of the criminal street gang Moreno Valley 13. A deputy at trial testified that carjacking was “a ‘typical signature-type crime ... that’s been made famous by gang members.’” (*Id.* at p. 654.) The gang expert testified that gangs establish respect by committing violent crimes and those who commit crimes gain respect from within the gang. (*Ibid.*) He further “testified that the carjacking would benefit the gang by providing general transportation to the gang’s members, by enabling transportation of narcotics for sale by the gang, by enabling transportation to commit further crimes by the gang, by providing economic benefit to the gang by sale of the vehicle, by elevating [the] defendant’s status within the gang, and by raising the gang’s reputation in the community.” (*Id.* at p. 656.)

The *Ochoa* court found the gang expert’s testimony was insufficient to establish the gang enhancement. “There was no evidence that *only* gang members committed

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<sup>27</sup> As the Attorney General notes, section 190.2, subdivision (a)(22), does not contain express language requiring the murder be committed “with the *specific intent* to promote, further, or assist in any criminal conduct by gang members” as required by the gang enhancement of section 186.22, subdivision (b)(1). (Italics added.) To the extent the Attorney General suggests the prosecution was not, therefore, required to prove Banda harbored an intent “to further the activities of the criminal street gang” (§ 190.2, subd. (a)(22)), we reject this suggestion. Due process requires that “criminal liability rest on *personal* guilt.” (*Castaneda*, *supra*, 23 Cal.4th at p. 748, citing *Scales v. United States* (1961) 367 U.S. 203, 224–225, italics added.) As a consequence, enhanced punishment based on association with a criminal organization requires a showing of the defendant’s “‘guilty knowledge and *intent*.’” (*Castaneda*, *supra*, at p. 749, quoting *Scales v. United States*, *supra*, at p. 228, italics added; see *Carr*, *supra*, 190 Cal.App.4th at p. 488 & fn. 13.)

carjackings or that a gang member could not commit a carjacking for personal benefit, rather than for the benefit of the gang.... While the [gang expert] effectively testified that carjacking by a gang member would always be for the benefit of the gang, this ““did nothing more than [improperly] inform the jury how [the expert] believed the case should be decided,”” without any underlying factual basis to support it. [Citations.]” (*Ochoa, supra*, 179 Cal.App.4th at p. 662.) The court further described the type of evidence that was lacking in the case:

“[The d]efendant did not call out a gang name, display gang signs, wear gang clothing, or engage in gang graffiti while committing the instant offenses. There was no evidence of bragging or graffiti to take credit for the crimes. There was no testimony that the victim saw any of [the] defendant’s tattoos. There was no evidence the crimes were committed in Moreno Valley 13 gang territory or the territory of any of its rivals. There was no evidence that the victim of the crimes was a gang member or a Moreno Valley 13 rival.... [The d]efendant was not accompanied by a fellow gang member.” (*Ochoa, supra*, 179 Cal.App.4th at p. 662, fn. omitted.)

The court concluded: “The [gang expert’s] testimony, as to how [the] defendant’s crimes would benefit Moreno Valley 13, was based solely on speculation, not evidence. An appellate court cannot affirm a conviction based on speculation, conjecture, guesswork, or supposition.” (*Ochoa, supra*, 179 Cal.App.4th at p. 663.)

Similarly, in the instant case, Banda did not call out a gang name, display gang signs, or engage in gang graffiti while committing the crime, he did not brag about the crime, he was not accompanied by a fellow gang member, the victim was not from a rival gang, and there is no evidence the crime was committed in gang territory.

Further, despite his assertion that gang members sometimes view law enforcement as their enemy, Sanchez did not testify that shooting an officer was a signature crime of Sureños, OGS, or BTL. To the contrary, he suggested that moving beyond committing crimes against rival gang members and targeting officers would represent a new type of crime for the gangs. (“Not only are they willing to commit crimes against their rival

gang members, but *now they're turning the page* onto officers as well.” (Italics added.)) Thus, Sanchez’s testimony that the shooting would benefit the gang (without identifying which gang it might benefit), like the expert testimony in *Ochoa*, was based on speculation and conjecture, not evidence. As such, it was not substantial evidence to support a finding that Banda killed Haws with an intent to further the activities of a criminal street gang.

Sanchez also testified that Banda was dressed like a gang member at the time of the shooting and, later, Banda told his brother the “homies” were taking care of him in jail. But reviewing the record as a whole, we conclude this was not sufficient evidence for a rational jury to infer that Banda harbored an intent to further the activities of a criminal street gang at the time he shot Haws. (Cf. *In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1356, 1362–1364 [no substantial evidence of intent to promote, further, or assist criminal conduct by gang members even though the defendant and his companions were all wearing red, the color associated with Norteños].) There was no evidence suggesting that Banda had reason to know that shooting an officer would benefit a criminal street gang or that committing such a crime would result in favorable treatment by gang members in jail.

### **3. Knowledge of the gang’s pattern of criminal activity**

Banda asserts there was no evidence showing he “‘knew that members of a gang engaged in or have engaged in a pattern of criminal gang activity.’” (*Carr, supra*, 190 Cal.App.4th at p. 488, fn. 13; see *People v. Robles* (2000) 23 Cal.4th 1106, 1115 [prosecution failed to establish the defendant was an active participant in a criminal street gang where it presented no evidence of knowledge that gang members engaged in or have engaged in a pattern of criminal gang activity].) We agree.

The Attorney General argues there was sufficient evidence that Banda knew of the gang’s pattern of criminal activity based on the following: In 2003, Banda indicated that he “backed” Southern gang members, which Aguilar testified meant that, if they were

involved in a fight, he would join them. At the same time, Banda admitted he knew Cardenas, who supplied him drugs and gave him a place to stay. Aguilar testified that Cardenas was the leader of OGS, but he did not specifically testify that Banda *knew* Cardenas was the leader of OGS. The Attorney General asserts, “From such a close association with the *leader* of the OGS gang, it can be inferred that [Banda] was aware of the gang’s pattern of criminal activity. At a minimum, Cardenas supplied [Banda] with drugs, a crime, and the parties stipulated that one of the gang’s primary activities is the sale of narcotics.” This is not sufficient evidence to infer knowledge of a pattern of criminal gang activity. There was no evidence presented that Banda ever joined a fight involving Southern gang members or that he knew of any instances of fights and, in any event, simple battery is not among the offenses that must be committed or attempted to constitute a “pattern of criminal gang activity.” (§ 186.22, subd. (e) [enumerating offenses].) Nor is evidence that Banda said Cardenas “[g]ave him drugs” sufficient evidence to infer that Banda knew Cardenas engaged in “[t]he sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances” on separate occasions (or, alternatively that Cardenas and another person engaged in the sale of controlled substances) as required under section 186.22, subdivision (e)(4), to show a pattern of criminal activity. (*Id.*, subd. (e) [offenses must be committed “on separate occasions, or by two or more persons”].) The parties stipulated that the primary activities of Sureños, BTL, and OGS included, among other crimes, narcotic sales, but this stipulation is not evidence that Banda *subjectively knew* these gangs engaged in a pattern of criminal activity at the time he shot Haws.

In short, there was no evidence from which a reasonable trier of fact could determine beyond a reasonable doubt that Banda knew of any of the gangs’ pattern of criminal activity. Consequently, the jury’s true finding of the gang special circumstance must be reversed.

#### ***D. Gang enhancement***

The gang enhancement applies to “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members ....” (§ 186.22, subd. (b)(1).)

Gang affiliation alone does not prove specific intent to promote, further, or assist in any criminal conduct by gang members. (See *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199; see also *Ochoa, supra*, 179 Cal.App.4th at p. 663 [“The gang enhancement cannot be sustained based solely on [the] defendant’s status as a member of the gang and his subsequent commission of crimes.”].) Here, the evidence presented was insufficient to establish Banda harbored the requisite specific intent for the same reasons there was insufficient evidence to support a finding of intent to further gang activities under section 190.2, subdivision (a)(22). As in *Ochoa, supra*, 179 Cal.App.4th at page 662, Banda did not call out a gang name or display gang signs while committing the crime, he did not brag about the crime, he was not accompanied by fellow gang members, the victim was not from a rival gang, and there is no evidence the crime was committed in gang territory.

Sanchez’s opinion testimony was not substantial evidence to support a finding of proof beyond a reasonable doubt that Banda shot Haws for the benefit of a criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members. (See, e.g., *In re Daniel C., supra*, 195 Cal.App.4th at p. 1363 [expert opinion that the defendant committed robbery to further interest of gang based on “premise that it was a violent crime, and gangs commit violent crimes in order to gain respect and to intimidate others in their community” insufficient where the defendant did not identify himself with any gang]; *Ochoa, supra*, 179 Cal.App.4th at p. 665 [substantial evidence for gang enhancement lacking where the defendant acted alone and expert opinion that crime was committed for benefit of a gang was unsubstantiated]; *In re*

*Frank S., supra*, 141 Cal.App.4th at p. 1199 [no substantial evidence supporting specific intent finding where the defendant was found alone in possession of a concealed knife and “prosecution presented no evidence other than the expert’s improper opinion on the ultimate issue to establish that possession of the weapon was ‘committed for the benefit of, at the direction of, or in association with any criminal street gang’”].)

**V. Discharge of Juror No. 5**

Finally, Banda claims the trial court committed prejudicial error when it dismissed a juror without any evidence that she was biased. This claim lacks merit.

**A. Background**

During the defense case in the guilt trial, the court received notes from two jurors. Juror No. 4 wrote: “What happens if Juror #5 is constantly making comments about the prosecution being mean or just making comments?” Juror No. 9 wrote: “The juror to my back left, Number 5, I think, keeps drawing her breath and making quiet remarks. I heard her call the DA stupid. She gets very frustrated and makes me question her impartiality.”

Outside the presence of the jury, the trial court explained it wanted to make sure “we were talking about the right juror,” and intended to speak to the note-writing jurors to confirm they were referring to the same person. The court stated: “If they both confirm it’s Number 5, I’m going to bring Number 5 out ... and just excuse her. We’ve had a couple of jurors indicating she’s made comments about the case. I’m going to have to let her go. Okay. I’m not going to get into an argument if we’ve got two separate jurors.”

The court brought Juror No. 4 and Juror No. 9 to the jury box, confirmed they wrote their respective notes, and confirmed they were referring to Juror No. 5. Banda’s attorney asked Juror No. 9, “Was this person making comments directly to you or [were you] just hearing it [from] behind?” The juror responded: “No. Just mumbles kind of under her breath. Today wasn’t the first day, but yesterday was just kind of, like, sighing

and drawing [her] breath where you can just tell she's frustrated about something. But then today I actually, like, heard things."

After hearing Juror No. 9's response, the court stated: "Okay. She's discussing the case. I mean, she's making utterances with the other jurors present that at least two jurors have heard. I'm going to have to let her go." The juror added, "Even just here at the end when they were talking about the phone call, she said, 'Well, she's not a doctor.'"<sup>28</sup>

Juror No. 5 was brought to the courtroom and the court told her: "It's been represented by some jurors that you've been making comments to yourself that were overheard during the trial regarding the prosecutor and some frustration in the case. And because of that, I'm going to let you go, ma'am. Thank you." Juror No. 5 responded, "Oh, okay."

After Juror No. 5 was dismissed, the court explained to the remaining jurors:

"Ladies and gentlemen, I had to excuse [Juror No. 5] because two jurors did exactly what they were supposed to do. [Juror No. 5] was making comments about the case and about the parties involved in the case while she was sitting in the jury box loud enough for other jurors to hear. And, so, one of the orders that I have is that you not discuss the case or form any opinions about the case until the case is over with. And because of that, the two reports, I had to let her go."

"Trials can be frustrating.... If you feel frustrated, that's okay.... [B]ut the main thing is, is that you need to keep that to yourself and not ... talk to the other jurors, not say anything loud enough or really not say anything about this case until the case is given to you to deliberate. So because [Juror No. 5] was unable to do that, I had to let her go."

An alternate juror took Juror No. 5's place.

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<sup>28</sup> Before the discussion of Juror No. 5, the previous witness was Maricella, who was asked about her telephone conversation with Banda after he was arrested.

## **B. Analysis**

Section 1089 provides: “If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court *is found to be unable to perform his or her duty*, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.” (Italics added.)

“Although [the California Supreme Court has] long held that the decision to discharge a juror under section 1089 is committed to the trial court’s discretion [citation], assessing the breadth of that discretion, at least with regard to the decision to discharge a seated juror, is more complex than it otherwise might appear.” (*People v. Fuiava* (2012) 53 Cal.4th 622, 711 (*Fuiava*).) While ““a trial court “has *broad discretion* to investigate and remove a juror in the midst of trial where it finds that, for any reason, the juror is no longer able or qualified to serve,”” “an appellate court’s review of the decision to remove a seated juror is not conducted under the typical abuse of discretion standard, but rather under the ‘demonstrable reality’ test.” (*Ibid.*)

““A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of solid value upon which a reasonable trier of fact *could* have relied in reaching the conclusion in question.”” (*Fuiava, supra*, 53 Cal.4th at p. 711.) “In contrast, ‘[t]he demonstrable reality test entails a more comprehensive and less deferential review. It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias [or misconduct] was established. It is important to make clear that a reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court’s conclusion is manifestly supported by evidence on which the court

actually relied. [¶] In reaching that conclusion, the reviewing panel will consider not just the evidence itself, but also the record of reasons the court provides.’ [Citation.]” (*Id.* at p. 712.)

Here, the trial court’s stated reason for discharging Juror No. 5 was that she made comments on the case—specifically comments regarding the prosecutor and comments that expressed frustration with the case—which violated the court’s orders that jurors “not discuss the case or form any opinions about the case” until deliberations. The court’s reason was supported by the statements of two jurors who heard Juror No. 5 make comments about the prosecutor during trial in the presence of the jury. This was sufficient evidence to support the court’s stated reason for discharging Juror No. 5.

Banda suggests the trial court erred by not questioning Juror No. 5 herself about the possibility of bias. We observe that Banda did not object or request an inquiry of Juror No. 5 after the trial court announced its intention to discharge Juror No. 5 if Juror No. 4 and Juror No. 9 confirmed they were referring to the same juror. Had Banda done so, any alleged error could have been corrected. (The court allowed Banda’s attorney to question Juror No. 9 and likely would have permitted her to question Juror No. 5 as well.) Under these circumstances, Banda’s claim has been forfeited. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293 [purpose of forfeiture rule is to encourage parties to bring errors to the attention of the trial court so they may be corrected].)

Even if we assume this claim was not forfeited by Banda’s failure to request an inquiry of Juror No. 5 before she was discharged, we see no abuse of discretion “in the manner in which [the court] conducted its inquiry.” (*Fuiava, supra*, 53 Cal.4th at p. 712.) The court had evidence from two jurors who *heard* Juror No. 5’s comments. This was sufficient evidence that she *made* the comments. Contrary to Banda’s claim, it was not necessary to ask Juror No. 5 about her ability to be fair to either side because the court did not discharge her on the grounds of bias; it discharged her for violating the

court's orders not to discuss the case or form any opinions about the case before deliberations.

Banda argues the trial court should have questioned Juror No. 5 "to determine whether she was willing to stop muttering in an audible manner" and "whether she was willing to follow the court's instructions." While it likely would have been within the trial court's discretion to take that approach, Banda offers no authority for the proposition that the trial court was *required* to give Juror No. 5 a second chance to comply with the court's orders.

Banda also asserts that Juror No. 5 did not engage in misconduct because "she did not discuss anything with anyone and because the comments she made to herself focused on criticizing the prosecutor and not on guilt or innocence." The trial court, however, determined that her comments, made loud enough for at least two jurors to hear, constituted a violation of the court's orders and, therefore, was misconduct. This determination was supported by substantial evidence for the reasons we have explained. Because it was within the court's discretion to discharge Juror No. 5 for this misconduct, Banda's claim fails. (See, e.g., *People v. Daniels* (1991) 52 Cal.3d 815, 865 [juror's duty "includes the obligation to follow the instructions of the court, and a judge may reasonably conclude that a juror who has violated instructions to refrain from discussing the case ... cannot be counted on to follow instructions in the future"].)

**DISPOSITION**

The true finding on the gang special circumstance (§ 190.2, subd. (a)(22)) for count 1 and the true finding on the gang enhancement (§ 186.22, subd. (b)) for counts 1 and 2 are reversed. The case is remanded and the trial court is directed to strike these gang-related findings from the judgment and to resentence Banda accordingly. The judgment is otherwise affirmed. The trial court is directed to prepare a new abstract of judgment.

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KANE, J.

WE CONCUR:

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LEVY, Acting P.J.

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DETJEN, J.